Criminal Procedure - The Robert Alton Harris Decision: Federalism, Comity, and Judicial Civil Disobedience

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CRIMINAL PROCEDURE

THE ROBERT ALTON HARRIS DECISION:1
FEDERALISM, COMITY, AND JUDICIAL
CIVIL DISOBEDIENCE

I. INTRODUCTION

On Tuesday, April 21, 1992, Robert Alton Harris became the first person to be executed in California in over 25 years.2 It was perhaps predictable, therefore, that his execution was preceded by a flurry of legal activity.3 Last minute lawsuits preempted a holiday weekend and extended into the early hours of the morning up until just 20 minutes before his 6:21 a.m. execution.4 The bulk of Harris' legal maneuvers encompassed a total of 16 habeas appeals over a 14 year period.5

This article touches on only three of the many issues raised by the Harris case.6 First, it explores the appropriateness of

1. Gomez v. United States Dist. Court, 790 F. Supp. 972 (N.D. Cal.) (Noonan, J., dissenting in 966 F.2d 460 (9th Cir.), vacated as moot, 966 F.2d 463 (9th Cir. 1992). The entire procedural history of Gomez and all related cases is attached as an Appendix.
3. A total of six lawsuits were filed in the week preceding his execution, three of them after 12 midnight on April 20, the time originally slated for Harris' execution. See Appendix, pp. 209-12.
4. See Appendix, pp. 209-12. If Harris' execution had not been carried out within 24 hours of the time denoted on the execution warrant (April 21 at 12:01 a.m.), the warrant would have expired. It would then have been necessary to cancel his execution and reschedule it, a process that would have taken anywhere from 30 to 60 days pursuant to California law. CAL. PENAL CODE § 1227 (1992).
5. There were six federal habeas petitions and ten state habeas petitions. See generally Appendix.
6. For a discussion of other primary and collateral issues concerning the Robert Alton Harris execution, see: Steve Baker, Justice Not Revenge: A Crime Victim's Perspec-
Harris' section 1983 class action filed on behalf of all California death row inmates. Specifically, Harris argued that death by lethal gas constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The Supreme Court characterized the section 1983 action as an attempt to avoid the application of McCleskey v. Zant, which bars successive claims for relief. By way of an extensive historical analysis, Harris was able to present a compelling case against the Eighth Amendment violation.

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9. Penal Code Section 3604 spells out lethal gas as the state's only method of execution. CAL. PENAL CODE § 3604 (1992). The state switched from death by hanging to lethal gas in 1937. Since capital punishment was reenacted in 1976, only six of 168 executed prisoners have been killed by lethal gas — four in Mississippi and one each in Nevada and Arizona, according to Harris' suit. Fierro v. Gomez, No. 92-1482-MHP (N.D. Cal.).
10. U.S. Const. amend. VIII (providing in pertinent part that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted").
cal analysis of each, this article examines the respective roles of section 1983 and habeas corpus in order to determine which was the appropriate vehicle for Harris' lawsuit. Nevertheless, the Supreme Court did not rest its decision to overrule Harris' stay upon McCleskey; rather, it applied an equitable standard to review Harris' request for an injunction against execution by means of lethal gas.¹³

This article also analyzes Harris' use of Teague v. Lane¹⁴ as both a sword and a shield, enabling him to simultaneously challenge retroactive application of the McCleskey standard to his case, while invoking the protection of an evolving standard for cruel and unusual punishment.¹⁵

Finally, this article examines the controversial decision by the Supreme Court to bar further stays "except upon order of this Court."¹⁶ Although the Supreme Court's edict has come under fire from various constitutional scholars,¹⁷ it has been praised by both scholars and practitioners alike.¹⁸ Several justifications for the Supreme Court's action have been offered, including the "inherent supervisory powers" of the Supreme Court,¹⁹ the All Writs Act,²⁰ and certain extraordinary circumstances which set the Harris case apart from earlier death pen-

¹³. Id. Justices Stevens and Blackmun filed a dissenting opinion asserting execution by the gas chamber does constitute cruel and unusual punishment. Id. at 1653-56.
¹⁴. 489 U.S. 288 (1989). Teague held that, "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 301.
¹⁵. See Weems v. United States, 217 U.S. 349, 373 (1910). The standard for deciding what constitutes cruel and unusual punishment is not set by what the prevailing norm was in 1789, but rather by an evolving adaptation to new evils. Id. at 373.
¹⁹. See infra notes 265-72 and accompanying text.
²⁰. 28 U.S.C. § 1651(a) (1988); see infra note 303.
II. FACTS AND PROCEDURAL HISTORY

A. FACTS

On July 5, 1978, Robert Alton Harris ("Harris") and his brother Daniel kidnapped two 16-year-old boys from a Jack-in-the-Box parking lot in Mira Mesa, California. The brothers drove the boys' car to a deserted canyon. After assuring the boys they would not be hurt, Harris shot one. The other boy ran, screamed for help and tried to hide. Harris pursued and killed him as well, after ordering him to "stop crying and die like a man." Harris then got into the car and finished the boys' hamburgers. He and Daniel drove to Harris' girlfriend's home, where Harris "belittled his younger brother for not having the stomach to join him in eating the boys' lunches." Later that day, the Harris brothers robbed a bank.

Upon their arrest for the bank robbery just hours later, Daniel informed the officers of the murders and confessed. Daniel placed the blame primarily on Harris.

After listening to portions of Daniel's statement, Harris confessed. He repeated his confession to a psychiatrist that eve-
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ning.\textsuperscript{33} He subsequently confessed in detail to a criminal investigator on July 7, 1978,\textsuperscript{34} and again one hour before he was arraigned that same day.\textsuperscript{35} Harris confessed again to his sister on July 15, 1978,\textsuperscript{36} and finally to a fellow inmate the following day.\textsuperscript{37} When asked why he had killed the boys, Harris answered, "I couldn't have no punks running around that could do that [identify him], so I wasted them."\textsuperscript{38} Although he denied the killings during the guilt phase of his bifurcated jury trial,\textsuperscript{39} Harris again confessed during the penalty phase of his trial in an attempt to demonstrate remorse as a mitigating factor.\textsuperscript{40}

\begin{quote}
down when I shot them. I shot one and he spun around. I then shot him in the head because I didn't want him to suffer. I chased the other and shot the other boy about three times. Danny was scared and he didn't shoot either of them.
\end{quote}

\textit{Id.} at 250.

\textsuperscript{33} \textit{Id.} During an interview concerning the murders, Harris told psychiatrist Dr. Walt Griswold he had shot the victims after assuring his brother they would not be hurt. \textit{Id.}

\textsuperscript{34} \textit{Id.} Harris told Investigator Boulden, among other things, "that he shot John Mayeski in the chest and head with the pistol, then chased Michael Baker and upon catching him, shot the boy three or four times with the pistol, and, finally, went back to Mayeski and shot him with the rifle." \textit{Id.}

\textsuperscript{35} \textit{Id.} at 244. Harris confessed in detail to Officer Ronald Newman. \textit{Id.} at 250. It was the detailed character of this confession that was used by the People to impeach Harris' testimony at trial. At trial, Harris claimed:

that he had no part in kidnapping, robbing and murdering the two boys; that his brother was solely responsible for the crimes; that his confessions were attempts to cover up for his brother, and that he learned the details of the crimes from his brother while they were detained at the police station.

\textit{Id.}

\textsuperscript{36} \textit{Id.} at 244. Harris told his sister Glenda, "Now, I guess because I killed those two boys, they were only 16 years old, then robbed the bank and kidnapped them because I really wanted to die." \textit{Id.} at 244-45.

\textsuperscript{37} \textit{Id.} at 245. Harris shared a holding cell with Joey Abshire on July 26, 1978. Harris v. Vasquez, 943 F.2d 930, 936 (9th Cir. 1990). Abshire testified that Harris said that:

him and his brother took two boys up in the hills and after they got up there [Harris] told them to get out; one of them got out and [Harris] shot him. And [Harris] went around the other side and the other kid was crying and telling [Harris] not to shoot him and [Harris] shot him anyway.

\textit{Id.}

\textsuperscript{38} Vasquez, 943 F.2d at 936-37. Sergeant Charles Shramek of the San Diego County Marshal's Office monitored Harris' conversation with Joey Abshire. \textit{Id.} at 937.

\textsuperscript{39} Harris, 623 P.2d at 245. Harris "admitted the bank robbery but denied kidnapping, robbing and murdering the two boys. He explained his pretrial confessions as attempts to protect his brother." \textit{Id.}

\textsuperscript{40} \textit{Id.} at 246. Harris confessed that he had, indeed, killed the boys. \textit{Id.; see also} Lungren & Krotoski, \textit{supra} note 6, at 297 n.5 (detailing at least seven confessions by Harris).
B. PROCEDURAL HISTORY

In March 1992, after his case had received 11 separate reviews, Harris's execution was set for 12:01 a.m. on April 21. But on April 17, Harris filed three new lawsuits: 1) his ninth state habeas petition, 2) his fourth federal habeas petition, and 3) a federal class action claiming that execution by lethal gas constituted cruel and unusual punishment under the Eighth Amendment.

On April 20, 1992, the Ninth Circuit unanimously denied Harris' federal habeas petition. In addition, the Ninth Circuit vacated a temporary restraining order ("TRO") that had been issued by United States District Court Judge Marilyn Hall Patel on the cruel and unusual punishment question.

At 6:30 p.m. that same day, a single Ninth Circuit judge issued the first order staying Harris' execution for 10 days. This action was reportedly spearheaded by Circuit Judge Betty Binns Fletcher of Seattle. The order reasoned that a sufficient hearing had not been granted on new evidence that Harris' brother and partner in crime, Daniel, had shot one of the two victims Harris was convicted of murdering.

At 10:20 p.m., ten Ninth Circuit judges reinstated Judge Patel's TRO, thereby generating a second stay. At 11:00 p.m., a

41. See Appendix, pp. 203-08 (discussing procedural history).
42. No. CR44135 (Super. Ct. S.D. County).
43. See Appendix, p. 209.
44. Harris v. Vasquez, 961 F.2d 1450 (9th Cir. 1992).
45. Gomez v. United States Dist. Court, 790 F. Supp. 972, 973 (N.D. Cal.) (Noonan, J., dissenting in 966 F.2d 460 (9th Cir.)), vacated as moot, 966 F.2d 463 (9th Cir. 1992).
46. See Howard Mintz & Richard Barbieri, Will Ninth Circuit Fall in Line?, THE RECORDER, Apr. 22, 1992, at 1 (reporting that a spokeswoman for the American Civil Liberties Union said the judge was Judge John Noonan Jr., but that Judge Noonan could not be reached for comment).
47. No. 92-55426 (9th Cir.) (first stay). Pursuant to existing Ninth Circuit rules, any single judge on the 28-member court may issue a stay of execution. 9TH CI.R. R. 22-5.
49. Id.
Ninth Circuit judge issued a third stay, also on the cruel and unusual punishment issue. The State appealed to the United States Supreme Court. At 11:20 p.m., the Supreme Court lifted the first stay. At 3:00 a.m., the justices, voting seven to two, lifted the other two stays.

Shortly before 4:00 a.m., Judge Harry Pregerson granted Harris' ex parte motion "to deem this [cruel and unusual punishment] matter appropriately a petition for a writ of habeas corpus" and issued the fourth stay of execution, this one reaching the prison after Harris had already been strapped into the chair. At 5:45 a.m., the United States Supreme Court lifted the final stay and ordered that no more stays be issued except by the Supreme Court. Harris was executed 36 minutes later in the San Quentin gas chamber.

III. BACKGROUND

Two federal remedies are available to state prisoners for postconviction complaints: habeas corpus and section 1983.

51. See Paddock & Weinstein, supra note 48, at A1 (reporting that Judge William Norris issued the third stay).
52. No. 92-70237 (9th Cir.) (third stay).
55. Gomez, 112 S. Ct. at 1653.
56. No. C-92-1482-MHP (N.D. Cal.); No. 92-70237 (9th Cir.).
60. 28 U.S.C. § 2254 (1988) (authorizing persons in custody pursuant to the judgment of a state court to bring habeas corpus actions in federal court to challenge the fact or duration of their confinement). Section 2254(b) explicitly requires that a state prisoner exhaust available state court remedies before bringing a habeas corpus action. Section 2254 provides in pertinent part:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the
State prisoners have used habeas corpus and section 1983 almost interchangeably in postconviction litigation because the two statutes overlap. The federal habeas corpus statute for state prisoners is fairly narrow, remedying only "custody in violation of the Constitution or laws or treaties of the United States." In comparison, section 1983 provides a remedy for a broad range of violations of constitutional rights under "color of" state law. Both statutes contemplate a civil remedy, but the latter does not have the prerequisite that all state remedies be exhausted.

judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.


Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

62. See supra note 60.

63. See supra note 61.

64. The Supreme Court in 1886 began requiring that state prisoners exhaust state remedies before a federal court could exercise its habeas corpus jurisdiction. See Ex parte Royall, 117 U.S. 241, 251 (1886) (denying federal writ until state trial proceedings finished); see also Ex parte Fondal, 117 U.S. 516, 518 (1886) (exhaustion of state appellate remedies); Pepke v. Cronan, 155 U.S. 100, 101 (1894) (exhaustion of state postconviction remedies); Darr v. Burford, 339 U.S. 200, 214 (1950) (seeking writ of certiorari to Supreme Court before federal habeas corpus). In Fay v. Noia, 372 U.S. 391 (1963), the Court abandoned the Burford holding. Noia, 372 U.S. at 437.

Congress codified the exhaustion doctrine in 1948. 28 U.S.C. § 2244(b) (1988). However, the doctrine continues to be based on the policy of federal-state comity and does not impose a jurisdictional requirement on federal courts. 17 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4261, at 651-54 (1978).

Conversely, a section 1983 claim cannot be blocked by imposing the exhaustion of state remedy requirement that would be appropriate to habeas relief. See Ellis v. Dyson,
Thus, the broad scope of section 1983 causes the statute to conceivably envelop all habeas corpus petitions to federal courts by state prisoners.

This potential for overlap did not create a problem until the 1960's when section 1983 became a more widely recognized remedy for constitutional violations. Since that time, state prisoners have gradually turned to the broad language of section 1983 as an alternative to habeas corpus relief. Federal courts therefore need clarification of the situations in which relief is appropriate under each remedy. Possible parameters for differentiation include different elements, procedures, and remedies available under each statute. The immediate access afforded by section 1983, coupled with the perception that claims receive more sympathetic hearings in federal court, may induce state prisoners to purposefully characterize their claims as section

421 U.S. 426, 432-33 (1975); Young v. Kenny, 907 F.2d 874, 875 (9th Cir. 1990).
65. See infra notes 141-47 and accompanying text.
67. See, e.g., Michael Weinman, To Stay or Not to Stay: Choosing a Procedural Course for Prisoners' Suits Stating Claims Under Both Section 1983 and Habeas Corpus, 21 MEM. ST. U. L. REV. 733, 733-35 (1991) (posing several hypotheticals which are particularly pertinent); see also infra notes 152-59 and accompanying text.
68. A petition for federal habeas corpus for a state prisoner must allege that the petitioner is in custody and that the detention violates the federal Constitution or statute. 28 U.S.C. § 2254 (1988).
To state a claim under section 1983, on the other hand, the plaintiff must first allege that a person has deprived him of a federal right. Second, the plaintiff must allege that the person acted under color of state law. 42 U.S.C. § 1983 (1988); see, e.g., Gomez v. Toledo, 446 U.S. 635, 640 (1980) (explaining that a plaintiff need not also allege an official acted in bad faith in order to state a claim for relief under section 1983).
69. If a state prisoner petitions a federal district court for habeas corpus relief without having exhausted available remedies, the district court will dismiss the petition. See supra note 60.
With regard to section 1983 actions, in 1980, Congress passed the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 (1988), which outlines grievance procedures a district court may require of a state prisoner bringing a section 1983 action to exhaust state remedies. 42 U.S.C. § 1997e (1988). However, requiring exhaustion in these cases remains in the district court's discretion. The statute allows the court to continue (but not dismiss) a prisoner's section 1983 action for 90 days to require exhaustion of "such plain, speedy, and effective administrative remedies as are available." 42 U.S.C. § 1997e(a)(1) (1988).
70. Federal habeas corpus relief is directed at relieving unconstitutional detention through an injunction ordering release of the state prisoner or a new trial. CHARLES A. WRIGHT, FEDERAL COURTS 332 (4th ed. 1983).
Procedurally, access to section 1983 courts appears far less challenging than access to modern habeas corpus review. Recent procedural changes, including a more stringent review for "abuse of the writ"72 and a new doctrine of non-retroactivity,73 have substantially narrowed the scope and character of habeas corpus. These changes have made section 1983 all the more attractive to state prisoners.74

In 1973, responding to the lower courts' need for guidance in classifying habeas corpus and section 1983 suits, the Supreme Court articulated a basic distinction between the two remedies and provided an analytic framework for their proper classification in *Preiser v. Rodriguez.*75 The Preiser court distinguished actions seeking only equitable relief to shorten a prisoner's sentence, such as the one before it, from actions seeking only damages for alleged constitutional deprivations.76 The former was at its core an action for habeas corpus, requiring dismissal if the prisoner did not first exhaust state court remedies.77 The latter was not an action for habeas corpus because it did not challenge the fact or duration of the prisoner's confinement and could

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71. One reason Congress perceived access to a federal forum as crucial when enacting section 1983 was that the state courts were perceived as more susceptible to local prejudice than the federal courts — prejudice which might cause their fact-finding processes to be defective. *Cong. Globe, 42d Cong., 1st Sess. 320 (1871); see* *Patsy v. Board of Regents, 457 U.S. 496, 505 (1982).*

72. *See McCleskey v. Zant, 111 S. Ct. 1454 (1991)* (abuse of the writ is not confined to instances of deliberate abandonment, i.e., repeated habeas petitions and appeals as delaying tactics; petitioner can also abuse the writ by raising a claim in a subsequent petition that could have been raised in the first petition).

73. *See, e.g., Butler v. McKellar, 494 U.S. 407 (1990)* (defendant was not entitled to retroactive benefit of Supreme Court decision announced on same day as denial of his habeas corpus appeal); *Teague v. Lane, 489 U.S. 288 (1989)* (a habeas petitioner may not rely on new procedural rules of criminal law decided after that petitioner's conviction became final); *Smith v. Murray, 477 U.S. 527 (1986)* (deliberate failure to raise constitutional issue on direct review precluded review of claim in federal habeas proceedings); *Barefoot v. Estelle, 463 U.S. 880 (1983)* (where there are second or successive federal habeas corpus petitions, it is proper for district court to expedite consideration of the petition).


76. *Id. at 499.*

77. *Id.*
therefore be brought under section 1983 without exhaustion of state remedies. Although the Court intended Preiser to be the vehicle for resolving the potential overlap in federal remedies, lower courts have continued to struggle to delineate the boundaries of each remedy and to establish their proper roles, particularly in cases where prisoners seek both types of relief. Such was the case in Harris.

A. THE "GREAT WRIT" OF HABEAS CORPUS

Habeas Corpus, which literally means "produce the body," has historically been the procedural method by which federal courts have overseen state judicial systems to ensure their compliance with federal constitutional law. The traditional purpose...
of federal habeas corpus was to remedy constitutional infractions resulting in the unjust imprisonment of innocent defendants. Chief Justice Warren heralded the "Great Writ" as "both the symbol and the guardian of individual liberty." 84

The habeas corpus writ post trial is not a constitutional right. It is a statutory right which was created during the Reconstruction Period following the Civil War. Congress feared that the states might resist the postwar constitutional amendments and challenge the federal court authority in criminal procedure, particularly in cases involving the newly freed slaves. 86

At the beginning of this century, the Supreme Court largely refrained from overseeing state trials. In Frank v. Mangum, for example, the Supreme Court refused to intervene and to overturn Leo Frank's murder conviction and death sentence despite evidence that he had been tried in a lynch mob atmosphere. Eight years later, Justice Oliver Wendell Holmes' dissent in Frank was adopted by a majority of the Court in Moore v. Peyton v. Rowe, 391 U.S. 54, 58 (1968).

Today, courts generally employ three forms of the common law writ of habeas corpus: 1) habeas corpus ad testificandum (secure prisoner's appearance as witness); 2) habeas corpus ad prosequendum (deliver prisoner for trial); and 3) habeas corpus ad subjiciendum (inquire into the legality of detention). Use of the term "habeas corpus" alone refers to habeas corpus ad subjiciendum. Preiser v. Rodriguez, 411 U.S. 475, 484 n.2 (1973).

84. See Peyton v. Rowe, 391 U.S. 54, 58 (1968).
86. See Yakle, supra note 85, at 85-86.
88. This decision illustrated the Court's reluctance to exercise the broad habeas corpus jurisdiction granted by Congress. In Frank, the Court found that the prisoner could have federal habeas corpus relief for his claim that a mob dominated his trial only if such mob control took away the court's jurisdiction. Id. at 327.
89. Id. at 345. Justice Holmes' dissenting opinion provides a classic statement of the principles underlying the writ of habeas corpus:

[H]abeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell.

Whatever disagreement there may be as to the scope of the
Dempsey. There, the Court held that where state courts fail to protect basic constitutional rights, federal courts should intervene. The Court emphasized that a state court process cannot be a mask for injustice: in such a scenario, the federal process must come into play.

The Warren Court substantially increased federal court habeas protection. As a result, federal habeas corpus petitions increasingly became a mechanism, particularly in death penalty cases, for setting aside death sentences.

However, the 1976 holding in Stone v. Powell was a harbinger of future eviscerations of habeas corpus jurisdiction over constitutional claims unrelated to the integrity of the guilt-determination process. Since 1976, in an effort to protect the role phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial . . . . We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted. In such a case, the Federal court has jurisdiction to issue the writ.

Id. at 346-47.
90. 261 U.S. 86 (1923).
91. Id. at 91-92 (overruling part of the Frank decision and holding that on a habeas corpus petition, a district court must determine the facts even though the state court had already rendered judgment); see also Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (violation of constitutional right to counsel robs the trial court of jurisdiction).
92. Moore, 261 U.S. at 91-92 (affirming that federal habeas corpus was available to state prisoners only if the convicting court lacked jurisdiction).
93. In Fay v. Noia, 372 U.S. 391 (1963), the Supreme Court expounded on the historical role of habeas corpus, stating: "We do well to bear in mind the extraordinary prestige of the Great Writ, habeas corpus ad subjiciendum, in Anglo-American jurisprudence." Id. at 399-400 (footnote omitted). The Court continued:

It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today. Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.

Id. at 401 (footnotes omitted).
94. A report by the Bureau of Justice Statistics indicates that close to 40% of death sentences which are commuted are set aside because of constitutional errors that were found by the federal courts in the state court proceedings. Bureau of Justice Statistics, United States Department of Justice, Habeas Corpus 5-6 (1984).
95. 428 U.S. 465 (1976) (denying habeas review of fourth amendment claims where state court provided a "full and fair" opportunity for hearing the claims).
96. Id. at 493-95. Justice Powell gathered a majority of the Court to curtail the opportunity of state prisoners to use federal habeas corpus to relitigate fourth amendment
of state courts in the enforcement of federal law, the Rehnquist Court has erected various procedural barriers to the assertion of claims of constitutional violations presented in federal habeas actions.97

For example, in 1977, the Supreme Court articulated the "cause-and-prejudice" test in Wainwright v. Sykes.98 The new standard barred federal habeas review of certain state prisoners' constitutional claims.99 If a state prisoner failed to lodge a timely objection under state rules, that claim was barred unless the prisoner could show: 1) cause for the noncompliance, and 2) actual prejudice from the alleged violation.100 After Wainwright, the law appeared to be settled: if the state denied the claim on the merits, the petitioner was automatically entitled to federal habeas review.101 If, on the other hand, the state denied the claim on procedural grounds, the petitioner was barred from federal habeas review absent a showing of cause and prejudice.102 But over the last two years, the Supreme Court has begun to reexamine this area of jurisprudence and the line between substance and procedure.

Substantively, the Supreme Court has drastically narrowed the scope of its review. The Supreme Court has held that even in a case in which there are real constitutional questions that have not been developed factually in a state appeal, the federal courts need not intervene.103

Most recently, the Court examined the issue of whether the Constitution even bars the execution of a person who has a valid

100. Id.
102. See Wainwright, 433 U.S. at 87.
103. Keeney v. Tamayo-Reyes, 112 S. Ct. 1715, 1719 (1992) (O'Connor, J., dissenting). In a 5 to 4 vote, Justice O'Connor authored the dissenting opinion, arguing that the decisions of the Warren Court were codified by Congress more than 25 years ago, and that it is inappropriate for the Supreme Court to attempt to change what Congress has done. Id. at 1721.
claim to innocence. This complex issue involves weighing a state's right to carry out its mandates against the preservation of an innocent individual's right to life.

Procedurally, state prisoners must now jump over a series of very difficult hurdles before their cases can be heard by the federal courts. Beginning in 1989, the Supreme Court articulated a new doctrine of non-retroactivity based on a model first proposed by Justice John Harlan in the 1960's. The new non-retroactivity doctrine focuses on a defendant's procedural posture, and largely ignores the purposes and effects of the specific constitutional rights involved.

In 1991, the Court moved even closer to Chief Justice Rehnquist's goal of streamlining the federal review process with its McCleskey v. Zant decision. In McCleskey, Justice Kennedy, writing for the majority, established a more stringent standard of review for abuse of the writ, making it even more difficult for inmates to obtain relief when raising new claims in subsequent federal habeas petitions.

104. Herrera v. Collins, 113 S. Ct. 853 (1993). The State of Texas argued that the state appeals process is adequate, and that if there is exculpatory evidence, Herrera should seek clemency from the governor, not help from the federal courts. Justice Antonin Scalia said a ruling in favor of the defense would open the floodgates of prisoner appeals: "The burden this would put on our system of justice is enormous." Joan Biskupic, High Court's Unusual Issue In Death Case, S.F. CHRON., Oct. 8, 1992, at A1.

In the decade between 1954 and 1963, the number of habeas corpus petitions filed increased 382%, and by 1963 habeas corpus petitions comprised 3.3% of the total federal caseload. 1963 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 200-201 (In 1963, 2,106 habeas corpus petitions were filed, out of a total of 63,630 civil actions commenced in 1963); 1954 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 101, 106 (598 habeas corpus petitions out of a total of 59,461 civil actions were commenced in federal courts in 1954).

By 1976 annual filings of federal habeas corpus petitions by state prisoners had grown 372% and constituted 6% of the total federal court caseload. 1976 ANN. REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 296, 300 (7,833 habeas corpus petitions were filed in 1976, out of 130,597 total civil actions commenced).


110. Id. at 1470. The decision limits most federal reviews of state criminal convictions to one trip through the habeas system. Id.
B. Narrowing Habeas Corpus: The Doctrine of Retroactivity

The Supreme Court first decided that new constitutional rules need not always be applied retroactively in Linkletter v. Walker.\footnote{111} Linkletter established that the “Constitution neither prohibits nor requires retrospective effect” for new constitutional rules of procedure.\footnote{112} The Court created a balancing test for analyzing the question of retroactivity that required consideration of the “prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.”\footnote{113}

Justice Harlan criticized the Court’s adoption of the Linkletter test and formulated his own retroactivity criteria based on the distinction between direct and collateral review.\footnote{114} He recommended that all new rules be applied retroactively to cases not yet final, and that no new rule be applied retroactively to cases that were final.\footnote{115} Justice Harlan’s main premise for this distinction was a widely shared concern that litigation should not continue indefinitely.\footnote{116}

Justice Harlan argued that habeas review serves two basic purposes, neither of which requires that habeas petitioners benefit from new rules. First, “it seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.”\footnote{117} Second, it

\footnote{111. 381 U.S. 618 (1965) (determining when the exclusionary rule should be applied retroactively to cases on collateral review).  
112. Id. at 629.  
113. Id. The Court articulated this standard as a three-pronged test in Stovell v. Denno, 388 U.S. 293 (1968). New rules must be measured by: (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. Id. at 297.  
115. See Mackey, 401 U.S. at 675; Desist, 394 U.S. at 256.  
116. Mackey, 401 U.S. at 691 (citing Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting): “No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.”).  
117. Desist, 394 U.S. at 262.}
acts as a necessary incentive for trial and appellate courts to conduct their proceedings in accordance with constitutional standards.\textsuperscript{118}

Justice Harlan recognized two exceptions where new rules could be applied to those on habeas review: first, where new substantive due process rules "place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe";\textsuperscript{119} and second, where procedures "implicit in the concept of ordered liberty" are violated.\textsuperscript{120}

Endorsing Justice Harlan's view of retroactivity, the Court in \textit{Teague v. Lane}\textsuperscript{121} held that "new" constitutional rules of criminal procedure generally should not apply retroactively to federal habeas review of state criminal convictions that became "final" before the "new law" was established.\textsuperscript{122} Having accepted the essential distinction of the Harlan test, the plurality opinion greatly expanded the definition of "new law" and reduced the scope of Justice Harlan's proposed exceptions.\textsuperscript{123}

According to \textit{Teague v. Lane}\textsuperscript{124} and its successor, \textit{Penry v. Lynaugh},\textsuperscript{125} a new rule of constitutional law may be applied on collateral review\textsuperscript{126} if it falls within one of three narrow exceptions.\textsuperscript{127} The first exception is a new rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."\textsuperscript{128} The second exception is a new rule "without which the likelihood of an accurate conviction is seriously diminished."\textsuperscript{129} The third exception is for new rules "prohibiting a certain category of punish-
ment for a class of defendants because of their status or offense.\textsuperscript{130}

\textit{Teague} represents a dramatic step in restricting federal habeas review of state court decisions. It mandates that unless the rule in a case is "dictated by precedent existing at the time the defendant's conviction became final," the case must be barred from federal court review.\textsuperscript{131} The Court offered little formal guidance in interpreting the scope of a "new rule."\textsuperscript{132} However, the cases cited by the Court as examples of "new rules" seem to reflect a fairly broad reading.\textsuperscript{133} In addition, the Court's stated desire to stem the flow of habeas petitions suggests that it will read \textit{Teague} broadly.\textsuperscript{134} Chief Justice Rehnquist, writing for the majority of the Court in \textit{Butler v. McKellars},\textsuperscript{135} declared that the definition of "new law" as announced in \textit{Teague}, "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."\textsuperscript{136} Thus, even if the state court reached the wrong result, in light of subsequent decisions, it did so "in good faith" and requires no habeas "deterrence" message.

C. \textbf{Section 1983}

Section 1983 provides a remedy in federal court for people

\begin{itemize}
  \item \textsuperscript{130} Penry, 492 U.S. at 330.
  \item \textsuperscript{131} Teague, 489 U.S. at 301.
  \item \textsuperscript{132} "New law," as defined in \textit{Teague}, is the result of any case that "breaks new ground or imposes a new obligation on the States or the Federal government," or in which "the result was not dictated by precedent existing at the time the defendant's conviction became final." \textit{Id.}
  \item \textsuperscript{133} In each instance, the Court referred to a case that did not overturn an old rule, but rather introduced a rule where none had previously existed. In \textit{Teague}, the Court cites several habeas cases in which new rules were fashioned. \textit{Id}; see, e.g., Rock v. Arkansas, 483 U.S. 44 (1987) (criminal defendants have a right to testify on their own behalf, and Arkansas' rule excluding all hypnotically refreshed testimony impermissibly infringes on that right); Ford v. Wainwright, 477 U.S. 399 (1986) (eighth amendment prohibits sentencing prisoner to death where the Court had never decided whether the Constitution forbids the execution of the insane).
  \item \textsuperscript{134} Shortly before the \textit{Teague} decision was handed down, Chief Justice Rehnquist (addressing the American Bar Association) outlined some measures to limit the number of habeas petitions and to streamline the process. He also complained that "litigation ultimately resolved in favor of the state takes literally years." \textit{The Third Branch}, 21 \textbf{BULL. OF FED. CTS.} 6 (Feb. 1989).
  \item \textsuperscript{135} 494 U.S. 407 (1990).
  \item \textsuperscript{136} \textit{Id.} at 414.
\end{itemize}
whose federally-guaranteed rights have been infringed by persons acting under color of state law. Congress passed section 1983 in response to the ineffectiveness of state courts in dealing with the reign of terror wrought by the Ku Klux Klan in the aftermath of the Civil War.

For many years after its enactment, the scope, reach, and requirements of section 1983 remained unclear. In the late 1800's and early 1900's, the Supreme Court limited the effectiveness of the Civil Rights Act as a remedy for violations of constitutional rights. Then in 1961, the Supreme Court's decision in Monroe v. Pape helped to define the role of section 1983.

The Monroe Court listed the three basic purposes of section 1983: 1) to override discriminatory state laws; 2) to provide a remedy where state law was inadequate; and 3) "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." The Supreme Court held that federal courts have jurisdiction over cases where state officials infringed upon federally-protected rights. The Court also emphasized that federal courts should exercise this jurisdiction even in cases where section 1983 plaintiffs have not exhausted state remedies.

Although Monroe did not involve a state prisoner claim, three years later, the Court expanded its ruling by holding that

139. Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (narrowly defining the substantive rights protected by the fourteenth amendment which the Act enforced and limiting fourteenth amendment protection to rights related to the national government).
141. In Monroe, the Supreme Court allowed plaintiffs to recover under section 1983 from local police officers who physically abused them during a search and seizure. Monroe, 365 U.S. at 168-70, 192.
142. Id. at 173-74.
143. Id. at 180-83.
144. The Court stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy [section 1983] is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183.
a state prisoner could sue prison officials under section 1983.\footnote{145} Since \textit{Monroe}, the Court has recognized the importance of a right to immediate access to a federal forum under section 1983.\footnote{146} Today, although still reluctant to interfere in state prison administration, federal courts will intervene when an important federal constitutional or statutory right is at stake.\footnote{147}

Generally, a section 1983 claim cannot be blocked by imposing the exhaustion-of-state-remedies standard that is required for habeas relief.\footnote{148} Yet, under the principles developed in \textit{Stone v. Powell},\footnote{149} a state prisoner is precluded from litigating constitutional claims in a section 1983 action despite the fact that those claims could not be heard on a petition for habeas.\footnote{150} The same principle of preclusion applies when a litigant has wrongfully failed to raise a section 1983 claim in a previous state court proceeding.\footnote{151}

Some courts addressing the question of which procedural

\footnote{145. Cooper v. Pate, 378 U.S. 546 (1964) (state prisoner alleged infringement of freedom of religion).}
\footnote{146. See \textit{Patsy v. Board of Regents}, 457 U.S. 496 (1982). A plaintiff need not pursue state remedies before proceeding with a claim under section 1983 because Congress enacted section 1983 "to 'throw open the doors of the United States courts' to individuals who were threatened with, or who had suffered the deprivation of constitutional rights and to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary." \textit{Id.}\ at 503-04 (quoting \textit{CONG. GLOBE}, 42d Cong., 1st Sess. 476 (1871)).}
\footnote{147. See \textit{Bell v. Wolfish}, 441 U.S. 520, 562 (1979) (discarding "hands-off" approach while avoiding undue interference).}
\footnote{148. See, \textit{e.g.}, \textit{Ellis v. Dyson}, 421 U.S. 426, 432-33 (1975); \textit{Young v. Kenny}, 907 F.2d 874, 875 (9th Cir. 1990).}
\footnote{149. 428 U.S. 465 (1976) (holding fourth amendment claims are not cognizable on habeas unless the state court fails to provide "full and fair" opportunity for hearing on the merits of a claim).}
\footnote{150. \textit{Allen v. McCurry}, 449 U.S. 90, 104-05 (1980).}
\footnote{151. \textit{Migra v. Board of Educ.}, 465 U.S. 75, 84-85 (1984). The prior state court proceeding, however, must have been adjudicative of the section 1983 issue in order for res judicata to apply. If those rights could not have been litigated in the state proceeding, then a criminal defendant is not precluded from bringing a section 1983 action to vindicate his constitutional rights. \textit{Haring v. Prosise}, 462 U.S. 306, 316-17 (1983).}
course to follow in hybrid section 1983/habeas corpus cases fear
that federal disposition of a section 1983 action prior to the state
court's reaching a final decision on a habeas corpus issue will
cause the federal court unduly to interfere with an ongoing state
court proceeding, thus conflicting with the rule set forth in
Younger v. Harris. According to the Younger Court, the
underlying reasons for this prohibition were notions of federalism
and comity, which the Court defined as:

a proper respect for state functions, a recognition
of the fact that the entire country is made up of a
Union of separate state governments, and a con­tinuance of the belief that the National Govern­
ten will fare best if the States and their institu­
tions are left free to perform their separate
functions in their separate ways.

The Court concluded that comity and federalism prohibited the
federal courts from enjoining state proceedings unless the state
action was the result of "bad faith or harassment," or if a stat­
ute was "flagrantly and patently violative of express constitu­
tional prohibitions in every clause, sentence and paragraph," or in "any other unusual circumstance that would call for equi­
table relief."

The Supreme Court has applied the Younger abstention
doctrine to claims seeking declaratory relief that would threaten
a pending state proceeding, and has extended Younger to pro­hibit federal courts from enjoining state civil proceedings in
which the state is a party, as well as cases in which important
state interests are at stake. Most recently, the Court has ap­plied Younger to a suit between two private parties implicating

152. In Younger, 401 U.S. 37 (1971), a section 1983 action seeking to enjoin a prose­
cution under California's Criminal Syndicalism Act, the Supreme Court held that "the
national policy forbidding federal courts to stay or enjoin pending state court proceed­
ings except under special circumstances" prohibited injunctions against ongoing criminal
proceedings. Id. at 41.
153. Id. at 44.
154. Id. at 54.
155. Id. at 53 (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).
156. Younger, 401 U.S. at 54.
precluded in pending civil action); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (party
must exhaust state appellate remedies before seeking relief in federal court).
important governmental interests.\textsuperscript{159}

IV THE COURT'S ANALYSIS

Harris' use of section 1983 as the vehicle for his lethal gas protest was scrutinized by the Ninth Circuit. The State of California petitioned the Ninth Circuit for a writ of mandamus vacating the TRO issued by United States District Judge Marilyn Hall Patel.\textsuperscript{160} The TRO, granted in connection with Harris' section 1983 gas chamber lawsuit, enjoined the state from using lethal gas in Harris' execution.\textsuperscript{161}

A. REJECTING THE DISTRICT COURT'S HOLDING

In granting the State's petition for a writ of mandamus, the Ninth Circuit scrutinized the fact that Harris simultaneously filed a section 1983 class action in federal court and a habeas corpus petition in state court.\textsuperscript{162} In his state court habeas petition, however, Harris did not raise the lethal gas argument, instead reserving that claim solely for the federal action.\textsuperscript{163} Judge Alarcon, writing for the majority, noted that in each of five prior state petitions for habeas corpus, Harris never challenged the use of lethal gas as a method of execution.\textsuperscript{164}

The court held that by failing to include this claim in the state habeas corpus proceedings, Harris had deliberately bypassed state review of his claim that execution by lethal gas is cruel and unusual punishment.\textsuperscript{165} The court found this tactic to be clearly violative of national policies of comity and federalism, i.e., "that federal courts should not intervene in state court proceedings nor assume that state court judges will deny litigants

\textsuperscript{159} Pennzoil Co. v. Texaco, 481 U.S. 1 (1987). "Younger abstention is mandated if the State's interests in the proceedings are so important that exercise of the federal judicial power would disregard the comity extended between the States and the National Government." Id. at 10.


\textsuperscript{161} Id. at 971.

\textsuperscript{162} Gomez v. United States Dist. Court, 790 F. Supp. 972 (N.D. Cal.) (Noonan, J., dissenting in 966 F.2d 460 (9th Cir.)), vacated as moot, 966 F.2d 463 (9th Cir. 1992).

\textsuperscript{163} Gomez, 790 F. Supp. at 972-73.

\textsuperscript{164} Id. at 973.

\textsuperscript{165} Id. at 974.
Because Harris did not give the California courts an opportunity to adjudicate his claim that death by lethal gas violates the Constitution, the Ninth Circuit held that the district court should have abstained from ruling on his motion for a temporary injunction. Therefore, a majority of the three-judge panel of the Ninth Circuit found that the district court's decision to issue the TRO was clearly erroneous, and vacated the district court's order.

B. JUDGE NOONAN'S DISSENT

The dissent was authored by Judge John Noonan, who later that day voted with a panel of ten Ninth Circuit judges to reinstate the TRO. Judge Noonan based his dissent on three factors: 1) The Ninth Circuit panel may not have complied with Ninth Circuit rules when it issued the writ of mandamus vacating Judge Patel's TRO; 2) The Ninth Circuit panel's decision to vacate Judge Patel's TRO conflicted with settled precedent; and 3) Issuing the writ of mandamus to proceed with Harris' execution could result in an irreparable violation of the Constitution of the United States.

1. Compliance with Ninth Circuit Mandamus Rules

Citing Ninth Circuit Rules 22-1 and 22-2, Judge Noonan's dissent.

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166. Id.
167. Id. at 975.
168. Id.
170. No. 92-70237 (9th Cir.).
171. Gomez, 966 F.2d at 461.
172. 9TH CIR. R. 22-1 provides:
The following rules apply to all proceedings within the jurisdiction of this court in cases brought pursuant to 28 U.S.C. § 2254 involving a sentence of death, including appeals from orders of United States District Courts granting or denying habeas corpus relief, motions for stays of execution, or applications for certificates of probable cause. To the extent that other Circuit Rules are inconsistent with these rules, these rules apply.
173. 9TH CIR. R. 22-2 provides:
The panel to which the case is assigned shall handle all mat-
nan questioned whether the Ninth Circuit panel had jurisdiction to issue mandamus in the *Harris* case. Indeed, because Harris’ lawsuit was filed as a section 1983 action and not a habeas petition, Judge Noonan reasoned it may not have fit within the parameters of Rule 22-2 either. Judge Noonan asserted it was “certainly arguable whether [Harris’ lawsuit] is a ‘collateral matter’ which ‘questions the sentence.’” If not, Judge Noonan concluded the three-judge Ninth Circuit panel may have lacked jurisdiction.

2. *Settled Precedent: The Standard of Review*

Assuming the Ninth Circuit panel properly exercised its jurisdiction in Harris’ lethal gas action, Judge Noonan questioned their finding that Judge Patel’s order was clearly erroneous. Judge Noonan recited the standard governing mandamus set forth in *Bauman v. United States* and reexamined the key issues pertaining to the issuance of a TRO: 1) Did the balance of hardships tip in favor of the party seeking the order? and 2) Were there “serious questions” presented? After assessing each issue, Judge Noonan dissented from the majority opinion, asserting that Judge Patel had correctly evaluated both of these factors.

ters pertaining to the case, including motions for a stay of execution, applications for certificate of probable cause, the merits, appeals from second or successive petitions, remands from the Supreme Court of the United States, and all incidental and collateral matters, including any separate proceedings questioning the conviction or sentence.

175. *Id.*
176. *Id.*
177. *Id.* Judge Noonan also pointed out the time lag between the court’s order of mandamus at 11:00 p.m. on Sunday evening and issuance of the opinion in support of the writ at 3:00 p.m. the following day. Thus, the opinion technically lacked any rationale for over 12 hours. *Id.* (citing Will v. United States, 389 U.S. 90, 107 (1967)).
178. *Gomez*, 966 F.2d at 462, (citing *Bauman v. United States*, 557 F.2d 650, 654-55 (9th Cir. 1977)). Under *Bauman*, the Ninth Circuit panel has jurisdiction to issue a writ of mandamus if “the district court’s order is clearly erroneous as a matter of law.” *Bauman*, 557 F.2d at 654-55.
179. *Gomez*, 966 F.2d at 462.
180. *Id.* at 463.
a. Balance of Hardships

Judge Noonan agreed with Judge Patel’s finding that the balance of hardships tipped in favor of the restraining order. Judge Noonan reasoned that death in a cruel manner is an injury that can never be repaired, whereas a postponement in the carrying out of an execution is an injury “more psychological and intangible than substantial.”

b. Serious Questions

Judge Noonan identified three serious questions. The first concerned the Younger abstention doctrine. Specifically, the question was whether the federal court should have abstained from intervening to prevent the execution of a state judgment. Judge Noonan noted that an interpretation of Younger which construed judicial proceedings to last through execution would be highly impractical. He reasoned that such an interpretation would preclude all habeas corpus petitions by death penalty inmates from the beginning of the prosecution until the moment of death, a result surely not intended by the Younger court.

The second serious question dealt with the issue of whether

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181. The court, through this process, weighs the effect of its decision on the interests of the parties involved. See Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987) (“To qualify for a preliminary injunction, the moving party must show . . . that serious questions are raised and the balance of hardships tips sharply in the moving party’s favor.”). In this case, Judge Noonan balanced the potential for suffering by Harris pursuant to the lethal gas execution against the state’s interest in proceeding with the scheduled execution in an orderly manner. Gomez, 966 F.2d at 462.

182. Gomez, 966 F.2d at 462.

183. Id.

184. If Judge Patel’s holding is read to indicate that the balance of hardships tipped sharply in Harris’ favor, then Ninth Circuit precedent required only that Harris raise questions serious enough to require litigation, not that he demonstrate a strong possibility of success on the merits of his suit. See Benda v. Grand Lodge, 584 F.2d 308, 315 (9th Cir. 1978). In such a case, it would have been within Judge Patel’s discretion to grant the TRO. Gomez, 966 F.2d at 462.

185. Gomez, 966 F.2d at 462.

186. Id. (citing Younger v. Harris, 401 U.S. 37, 45 (1971)).

187. Gomez, 966 F.2d at 462. The state argued that the abstention doctrine set forth initially in Younger and developed by its progeny has been extended so that a federal court should not prevent the carrying out of a state judgment. Id.

188. Id.

189. Id.
the section 1983 class action, so far as it affected Harris, was an impermissible evasion of the ordinary requirements for habeas corpus. Judge Noonan analyzed the problem in the following manner. Generally, a section 1983 claim cannot be blocked by imposing the exhaustion-of-state-remedy requirement that would be appropriate to habeas relief. However, the State contended that in reality, Harris' lawsuit, while on its face a section 1983 claim, was actually brought only to prevent Harris' execution. Therefore, the State contended, the section 1983 action, at least so far as it pertained to Harris, was really a petition for habeas corpus, and should be treated as such.

But Judge Noonan reasoned that turning a section 1983 action into a habeas petition for Harris and barring it for lack of exhaustion would have serious ramifications. He emphasized that no other circuit has held that an Eighth Amendment claim regarding the mode of execution is only cognizable under habeas corpus.

The final serious question Judge Noonan recited was the issue of whether death by lethal gas constitutes cruel and unusual punishment under the Eighth Amendment. Judge Noonan found that "evolving standards of decency" are an appropriate consideration under Weems v. United States. In examining the current standard of human decency in these matters, Judge Noonan therefore determined that the indicia should be objective, and that the best index is the practice of other state legislatures. Judge Noonan emphasized that only two states other

190. Id.
191. Id. at 462-63 (citing Ellis v. Dyson, 421 U.S. 426, 432-33 (1975) and Young v. Kenny, 907 F.2d 874, 875 (9th Cir. 1990)).
192. Gomez, 966 F.2d at 462.
195. Gomez, 966 F.2d at 463. Both the Fifth and Eleventh Circuits have considered challenges to the manner of execution as properly raised under Section 1983. Id. (citing Sullivan v. Dugger, 721 F.2d 719 (11th Cir. 1983) and Byrne v. Roemer, 847 F.2d 1130 (5th Cir. 1988)).
196. Gomez, 966 F.2d at 463.
197. Id. (citing Weems v. United States, 217 U.S. 349, 373 (1910)).
than California authorized death by lethal gas. 199

3. A Serious Constitutional Question

Judge Noonan concluded that, with regard to the issue of whether or not the use of lethal gas in carrying out an execution is cruel and unusual punishment, the balance of hardships weighed in favor of Harris and serious questions were posed. 200 Thus, carrying out Harris' death sentence in a cruel and unusual manner would result in an irreparable violation of the Constitution of the United States, and Judge Patel had properly granted the TRO. 201

C. THE SUPREME COURT

Following the Ninth Circuit panel's decision to vacate the district court's TRO, 202 ten Ninth Circuit judges issued an order reinstating it. 203 The Supreme Court subsequently issued an opinion vacating the TRO, providing several reasons for its decision. 204

First, the Supreme Court noted that under McCleskey v. Zant, 205 Harris was required to show cause for his failure to present his cruel and unusual punishment claim in his earlier habeas petitions. 206 The Supreme Court pointed out that Harris had filed four prior federal habeas petitions (and eight prior state habeas petitions), and that he had no convincing explanation for his failure to raise the cruel and unusual punishment

199. Gomez, 966 F.2d at 463. The first was Maryland, which had not had an execution since 1961. The other was Arizona, where in reaction to the execution of Don Eugene Harding on April 6, 1992, the Arizona state legislature took steps to abandon lethal gas as a means of execution. Legislation was proposed in response to substantial medical evidence that unnecessary suffering was inflicted in Harding's execution. Id. Furthermore, eight states in the preceding 15 years had abolished execution by lethal gas. Id.
200. Id.
201. Id. at 461.
203. No. 92-70237 (9th Cir.) (second stay).
204. Gomez v. United States Dist. Court, 112 S. Ct. 1652, 1653 (1992) (per curiam) (No. A-767). In addition to vacating the second stay, this decision also vacated a third stay issued by a single Ninth Circuit judge. Id; see also supra notes 51-52 and accompanying text.
The Court held that even if McCleskey did not bar the claim, Harris was precluded on equitable grounds from asserting the claim. First, the Court reasoned that Harris' failure to raise his cruel and unusual claim 14 years earlier constituted abusive delay. Second, such delay was compounded by last-minute attempts to manipulate the judicial process. The Court also considered the State's strong interest in proceeding with its judgment. Finally, the Court determined that it was appropriate to consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

Concluding that Harris had failed to show cause for his failure to raise the gas chamber claim in his prior petitions, the Court vacated the stay of execution granted by the ten judges of the Ninth Circuit.

V. CRITIQUE

A. HABEAS VS. SECTION 1983: A TACTICAL MANEUVER

Filing a section 1983 class action just one week before Harris was scheduled to be executed was a stroke of genius and desperation on the part of his lawyers. Face of a class action protesting the gas chamber as a mode of execution would not be classified as an appropriate habeas action, since it does not dispute the fact or length of imprisonment. Moreover, Harris argued that the Eighth Amendment claim of cruel and unusual punishment upon which the action was founded involves an evolving standard of decency. As such, the claim could not have been raised earlier, during his 12 prior habeas petitions, for

207. Id.
208. Id. Notably, the Supreme Court applied a civil standard to Harris' request for an injunction in a criminal proceeding. See id.
209. Id.
210. Id. For example, Harris raised his claim as a section 1983 action despite the appropriateness of habeas corpus as an avenue for relief.
211. Id.
212. Id.
213. Id.
214. Fierro v. Gomez, No. 92-1489-MHP (N.D. Cal.).
example, because it became ripe only after the execution by lethal gas of Don Eugene Harding in Arizona on April 6, 1992.²¹⁶

Harding’s execution was immediately followed by the abandonment of that mode of execution by the State’s attorney general.²¹⁷ Therefore, Harris argued that this was an indication that the standard for what constituted “cruel and unusual” had evolved. Harris further argued that he could not file his class action suit until after his appeal for clemency from Governor Wilson was denied, thereby assuring the mode of his death.²¹⁸

The section 1983 lawsuit was filed on behalf of all California death row inmates and claimed that execution by lethal gas constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.²¹⁹ The Supreme Court properly recognized the section 1983 action as an attempt to avoid the application of McCleskey v. Zant.²²⁰

Professors Caminker and Chemerinsky assert that the Supreme Court mistakenly applied habeas corpus rules, i.e., the McCleskey bar against successive habeas claims for relief, to a properly filed section 1983 claim.²²¹ This is not the case for two reasons.

First, arguably, the Supreme Court did not mistakenly characterize Harris’ claim, and did not use McCleskey as a reason for vacating the stays. The exact language reads:

This case is an obvious attempt to avoid the application of McCleskey v. Zant to bar this successive claim for relief. Harris has now filed four

²¹⁶. Harding was not pronounced dead until ten minutes after two cyanide pellets were dropped into a bowl of sulfuric acid beneath his chair. Witnesses described a gruesome scene of Harding gasping, shuddering and desperately making obscene gestures with both strapped-down hands. Nation in Brief, THE ATLANTA CONSTITUTION, Apr. 25, 1992, at A6.


²¹⁹. Id. at 967.


²²¹. Caminker & Chemerinsky, supra note 6, at 237.
prior federal habeas petitions. He has made no convincing showing of cause for his failure to raise this claim in his prior petitions.

Even if we were to assume, however, that Harris could avoid the application of McCleskey to bar his claim, we would not consider it on the merits. Whether his claim is framed as a habeas petition or § 1983 action, Harris seeks an equitable remedy.222

The language by Justice O'Connor recognized Harris' attempt to circumvent the McCleskey standard.223 It also suggested that under McCleskey, Harris' claim would fail.224 But the Court's ultimate holding was not based on the McCleskey reasoning. Rather, it rested entirely on a balancing of the equities.225

As further evidence of the Court's intent, the Court took the unusual step of issuing an amended opinion on May 6, 1992.226 Originally, the language of the opinion read, "Harris claims that his execution by lethal gas is cruel and unusual in violation of the Eighth Amendment."227 The amended opinion reads, "Harris brought a 42 U.S.C. § 1983 action claiming that his execution by lethal gas is cruel and unusual in violation of the Eighth Amendment."228 Thus, the Court, while convinced that Harris' gas chamber action was an attempt to avoid McCleskey, was cognizant that Harris had filed a section 1983 action, not a habeas petition.

The more difficult question is whether section 1983 was an appropriate vehicle for Harris' gas chamber action. Harris was seeking injunctive relief, not damages. Under the Court's analysis in Preiser v. Rodriguez,229 his action was therefore arguably at its core an action for habeas corpus. Harris sought to chal-

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222. Gomez, 112 S. Ct. at 1653.
223. Id.
224. Id.
225. Id.; see text accompanying supra notes 208-13.
228. Gomez, 112 S. Ct. at 1653 (emphasis added).
lenge one of the facts of his execution,\textsuperscript{230} not the conditions of his imprisonment.\textsuperscript{231} The \textit{Preiser} court specifically stated that a challenge to the fact or duration of confinement must be brought by way of a petition for habeas corpus.\textsuperscript{232} Consequently, Harris' action was arguably more appropriately a habeas petition rather than a section 1983 action. Yet he sought to challenge a constitutional infringement, the imposition of a cruel and unusual punishment, for which the federal courts are an appropriate forum.

Harris' case is a classic example of the confusion surrounding attempts by federal courts to properly distinguish between habeas corpus and section 1983 actions in the aftermath of \textit{Preiser}.\textsuperscript{233} Congress has considered numerous proposals for habeas reform,\textsuperscript{234} but no new legislation has been enacted.

One possible solution would be to eliminate section 1983 altogether as a remedy for state prisoners' claims and establish an expanded federal habeas corpus as the sole remedy for those claims. The scope of the expanded habeas corpus provisions would necessarily include remedies for complaints concerning

\begin{footnote}
\textsuperscript{230} By challenging the means of execution, Harris was in essence challenging a judicial pronouncement. It was the pronouncement of Superior Court Judge Eli Levenson that: "Robert Alton Harris shall be put to death by the administration of lethal gas." Fierro \textit{v.} Gomez, 790 F. Supp. 966, 968 n.4 (N.D. Cal. 1992).

\textsuperscript{231} The Supreme Court has declined to address whether conditions of confinement claims may be brought under habeas. \textit{Bell v. Wolfish}, 441 U.S. 520, 527 n.6 (1979).

\textsuperscript{232} \textit{Preiser}, 411 U.S. at 489-90.

\textsuperscript{233} See supra notes 75-80 and accompanying text.


Comments concerning the role of habeas corpus apply equally well to the relationship between section 1983 and habeas corpus. Congress should determine the function of each and should resolve the confusion about the relationship between the two remedies.
\end{footnote}
conditions of confinement and damages, provisions currently accommodated by section 1983. Such a reform would preserve principles of comity and federalism by ensuring the states’ opportunity to correct constitutional violations through the exhaustion of state remedies requirement. Establishing habeas corpus as state prisoners’ exclusive remedy could thereby eliminate the current confusion between habeas corpus and section 1983 actions without compromising individual rights.

Until Congress definitively addresses this issue, however, defining the scope of habeas will remain in the exclusive province of the Supreme Court.

B. **Teague v. Lane: A Sword and a Shield**

Harris’ attorneys denied the State’s assertions that his section 1983 class action was really a petition for habeas corpus. Yet at the eleventh hour, he converted his section 1983 class action lawsuit into a habeas petition. After reading Justice Stevens’ dissent to the Supreme Court’s opinion vacating Harris’ second and third stays, Harris’ incentive for this conversion becomes patently clear.

Asserting his claim as a habeas petition allowed Harris to rely on *Teague v. Lane* as both a sword and a shield, enabling him to simultaneously complain the *McCleskey* standard should not be retroactively applied to his case while invoking the

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236. At Harris’ request, the section 1983 action was converted into his sixth federal habeas petition. No. C-92-1482-MHP (N.D. Cal.); No. 92-70237 (9th Cir.).
238. Justice Stevens wrote, “if execution by cyanide gas is in fact unconstitutional, then the State lacks the power to impose such punishment. Harris’ delay, even if unjustified, cannot endow the State with the authority to violate the Constitution. It was this principle . . . that a plurality of this Court embraced in Teague v. Lane.” Gomez, 112 S. Ct. at 1656.
Notably, Justice Stevens’ dissent invoked the protection of *Teague* while Harris’ lawsuit was still a section 1983 action and not a habeas petition. *See generally* Appendix for the sequence of events.
protection of *Weems v. United States*\(^{241}\) against his execution by lethal gas.\(^{242}\)

1. **Teague as a Sword**

Harris contended that his lawsuit became ripe only after April 5, 1992.\(^{243}\) He asserted that there was an evolving constitutional standard as to what constitutes cruel and unusual punishment,\(^{244}\) and that the most recent standard should be applied to his case.\(^{245}\)

If indeed execution by lethal gas constituted cruel and unusual punishment under the Eighth Amendment, then Harris' claim would fall within one of the exceptions of *Teague*, i.e., “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”\(^{246}\) Therefore, it is arguable that the new rule as to what constitutes

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241. 217 U.S. 349, 373 (1910) (holding that the standard for deciding what constitutes cruel and unusual punishment is not set by what the prevailing norm was in 1789, but rather by an evolving adaptation to new evils).

242. This was not the first time Harris relied on *Teague*. Harris' third habeas petition claimed that the psychiatric assistance provided to him at the penalty phase of his trial was incompetent and thereby violated the rule of *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985), a case decided three years after Harris' second petition was filed. *Harris v. Vasquez*, 901 F.2d 724, 726 (9th Cir. 1990). Ninth Circuit Judge Noonan found that Harris had not abused the writ of habeas corpus because *Ake* was both a fundamental rule and was unavailable at the time of Harris' previous petitions. Id. at 726-27. However, under *Teague*, the novelty of *Ake* rendered the case nonretroactive unless it fell within a *Teague* exception. Judge Noonan held that a reasonable jurist could conclude that the *Ake* rule fell within the second *Teague* exception (new rules “without which the likelihood of an accurate conviction is seriously diminished,” *Teague*, 489 U.S. at 313) because *Ake* was based on considerations of fundamental fairness and enhanced the accuracy of the jury's conclusions. Therefore, Judge Noonan concluded that a colorable argument could be made that the rule would be applied retroactively, despite its novelty. *Harris*, 901 F.2d at 726-27. Harris' claims were ultimately barred because he had raised similar issues in prior petitions. *Harris v. Vasquez*, 913 F.2d 606, 618 (9th Cir. 1990).

243. See supra notes 215-18 and accompanying text.

244. Harris' argument had been tried and failed before. In 1983, the Fifth Circuit Court of Appeals denied convicted murderer Eddie Lucas an evidentiary hearing on his claim that death by cyanide gas was cruel and unusual. *Gray v. Lucas*, 710 F.2d 1048 (5th Cir. 1983). At that time, only three members of the Supreme Court felt the issue of the method of execution raised sufficiently serious questions under the eighth amendment to merit review by writ of certiorari. See *Gray v. Lucas*, 463 U.S. 1237 (1983).


246. See *Teague*, 489 U.S. at 307 (the other exception is for new rules “without which the likelihood of an accurate conviction is seriously diminished.”).
cruel and unusual punishment should be applied retroactively to Harris’ case despite the fact that this was not the constitutional standard that prevailed at the time the original proceedings took place.247

By using *Teague* to assert his right to apply a new constitutional standard retroactively, Harris used the case as a sword. Harris argued that if execution by lethal gas was in fact unconstitutional, then the State lacked the power to impose such a punishment. However, this reading of *Teague* interprets a “new rule” very narrowly and interprets the “exceptions” very broadly. Such an interpretation contravenes the Court’s intent. For example, in *Butler v. McKellar*,248 Chief Justice Rehnquist wrote that if at the time a defendant’s conviction became final the applicability of a particular rule of criminal procedure “was susceptible to debate among reasonable minds,” as evidenced by a split of authority among lower courts, then the state court “reasonably” could have decided the issue either way.249 In such a case, according to the *Butler* Court, a habeas court may not set aside the defendant’s conviction based on the state court’s resolution of the issue in dispute.250

Because the issue of whether death by lethal gas constitutes cruel and unusual punishment is “susceptible to debate among reasonable minds,” and because at the time Harris’ conviction became final, the state court “reasonably” could have decided the issue either way, it would have been inappropriate for the Supreme Court to set aside Harris’ sentence on that basis.

2. *Teague* as a Shield

Harris also attempted to use *Teague* to shield his constitutional challenge from the strict scrutiny enunciated in *McCles-
The Court in *Teague* adopted Justice Harlan’s reasoning that “given the ‘broad scope of constitutional issues cognizable on habeas, it is sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.’”

Because *McCleskey* itself constituted a change in the constitutional interpretation of the right to habeas review, its application was arguably inappropriate to Harris’ case, and therefore could not bar his habeas petition. At the time Harris’ case was decided, no rigid “abuse of the writ” doctrine existed. Thus, it is arguable under *Teague* that individuals who were convicted and whose cases arose for habeas review prior to 1991 should not subsequently be denied relief on the basis of new rules which restrict the scope of habeas review.

By asserting his right to raise a constitutional issue not raised in prior habeas petitions, Harris attempted to use *Teague* to shield him from the Court’s “abuse of the writ” standard enunciated in *McCleskey*. However, the Supreme Court held that the *McCleskey* standard was applicable to Harris’ case. This is undoubtedly because under the definition enunciated in *Butler*, the *McCleskey* decision did not create a new rule within the meaning of *Teague*, and thus could appropriately be applied to the pending case if it were indeed a habeas action.

The Harris case demonstrates that the retroactivity test created in *Teague* could virtually eliminate retroactive rules from habeas corpus cases. Taken together, the expanded new rule definition and the extremely limited exceptions to non-retroactivity will greatly reduce the chances that defendants receive the benefit of new rules of criminal procedure on habeas corpus review.

253. 111 S. Ct. at 1470.
254. See *Gomez v. United States Dist. Court*, 112 S. Ct. 1652, 1653 (1992) (holding that if Harris’ claim was indeed a habeas petition, it would be barred by *McCleskey*).
256. Because at the time of their decision Harris’ suit was still a section 1983 action, the Supreme Court did not base their ruling to overturn Harris’ stays on *McCleskey*. *Gomez*, 112 S. Ct. at 1653.
In general, this result will comport with the widely desirable goal of reducing the total amount of habeas litigation. However, it would be advisable to expand *Teague* to provide a mechanism for judges to respond to accuracy concerns in individual cases rather than determining retroactivity on a strictly categorical basis.

Such a modification would promote the important values of federalism and comity by curbing erosion of the finality of state criminal convictions, without limiting the "great writ's" ability to perform its noble and historic purpose.

C. INTERVENTION BY THE SUPREME COURT

The Supreme Court's decision to bar further stays "except upon order of this Court" is perhaps the most controversial issue in the Harris case. In a recent Yale Law Journal article, Professors Calabresi and Lawson considered the proper relationship between the Supreme Court and the inferior federal courts. They concluded that the Court had no authority to issue such an order.

But Attorney General Dan Lungren has stated that the Supreme Court may have been relying upon one or more of several factors. First, the Court may have invoked the All Writs Act or its inherent "supervisory power" to protect the integrity of the proceedings and its ability to hear any subsequent motions after the Ninth Circuit office had shut down for the night. Second, the Harris case involved certain extraordinary circumstances which rendered it unique in comparison to other death

258. Calabresi & Lawson, *supra* note 6, at 271; see also Caminker & Chemerinsky, *supra* note 6, at 246-52.
262. See, e.g., *McNabb v. United States*, 318 U.S. 332, 341 (1943) (establishing the Supreme Court's supervisory authority as an independent basis for decision); *United States v. Hale*, 422 U.S. 171, 181 (1975) (a more recent exercise of the Supreme Court's supervisory powers); *United States v. Caceres*, 440 U.S. 741, 756 n.22 (1979) (the Supreme Court declined to exercise its supervisory powers, though acknowledging their force).
263. Lungren, *supra* note 9, at 4.
penalty cases.264 A closer examination of the details of that evening suggests there is credence to these arguments.

1. **Inherent Supervisory Power**

The Supreme Court has relied on its “supervisory authority over the administration of criminal justice in the federal courts”265 as an independent basis for decision for over 50 years.266 The Court’s opinion in *McNabb v. United States* was expressly grounded on the Supreme Court’s “limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases.”267

Although several cases have suggested that the Court’s supervisory power derives from the All Writs Act,268 the consensus appears to be that it is an implied or inherent power.269 One of the justifications most commonly offered for the latter conclusion is that the judiciary must *necessarily* have the authority to protect its own integrity in order to carry out its functions.270

The supervisory power is often exercised to prevent or correct injustice where existing procedures have proved inadequate.271 In many cases, the problem could have been solved

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264. *Id.*; see also infra notes 326-36 and accompanying text, detailing the circuitous path of Harris’ 14 years of legal maneuverings, as well as questionable conduct by his attorneys in the final hours preceding his execution.


266. *Id.* Concluding in *McNabb* that “[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence,” the Court excluded a defendant’s confession because it was the product of prolonged illegal detention. *Id.* at 340, 347.

267. *Id.* at 347.


without resort to the Court's supervisory power but frequently only by distorting traditional legal doctrines.\footnote{272}

The events of Harris' final hours illuminated several shortcomings in the sufficiency of existing Ninth Circuit procedures to prevent injustice. Arguably, these events merited the Supreme Court's intervention.

In an address delivered by Ninth Circuit Judge Stephen Reinhardt\footnote{273} at Yale Law School on April 25, 1992,\footnote{274} Judge Reinhardt noted that Ninth Circuit judges are scattered over the entire western part of the United States, and that it was difficult for the judges to communicate quickly and effectively among themselves on the evening of April 21.\footnote{275} These logistical difficulties, he explained, were compounded by a malfunction in the electronic mail system which resulted in some judges not receiving all communications, and others receiving communications only after the time for voting had passed.\footnote{276}

According to newspaper accounts, some judges said they were confused about which issue they were voting on, and at least one said he was never even contacted even though he was at home.\footnote{277} Several judges said they were unaware that stays had been ordered.\footnote{278} Others said they went to bed thinking the execution had been stayed, only to wake up in the morning and learn from television that Harris had been executed.\footnote{279}

"There simply was not sufficient time for the regular pro-

\begin{footnotes}
\footnote{272. Id.}
\footnote{273. Judge Reinhardt was one of the ten judges who voted to grant the second stay in the Harris case. Gomez v. United States Dist. Court, No. 92-70237 (9th Cir. Apr. 20, 1992) (Canby, Fletcher, Hug, D.W. Nelson, T.G. Nelson, Noonan, Norris, Poole, Prger­son, Reinhardt, J.J.) (second stay).}
\footnote{274. See Reinhardt, supra note 6.}
\footnote{275. Id. at 209.}
\footnote{276. Id. "So voluminous was the flurry of after-hour communications that chaos reigned through the night as the computer system of the far-flung Ninth Circuit got hopelessly bogged down and the judges argued over long distance phone lines about Harris' fate." Richard C. Paddock & Henry Weinstein, Appeal Judges Maneuvered Amid Chaos, L.A. Times, Apr. 22, 1992, at A1.}
\footnote{277. Paddock & Weinstein, supra note 276, at A1.}
\footnote{278. Id.}
\footnote{279. Id. "I walked in this morning quite surprised that the execution took place without our being informed," one judge said. Id.}
\end{footnotes}
cess to work in an orderly manner." Thus, on Monday evening, while a group of ten Ninth Circuit judges entered an order staying the execution, another judge simultaneously led an effort to obtain the votes of a majority of the court to override the panel’s interpretation of the habeas rules. One of the consequences of the chaos was that the third stay issued by a single judge on Monday evening was “of absolutely no practical significance,” and “duplicated the one that had already been issued by the ten judges of the court.”

Furthermore, the Ninth Circuit clerk’s office shut down after the third stay of the night was vacated. This made it difficult to quickly verify subsequent orders received from the Ninth Circuit.

Finally, at 3:51 a.m., after Harris had already been strapped into the electric chair, Judge Harry Pregerson, who had already participated in the second stay, issued a fourth stay. Judge Reinhardt suggested that Judge Pregerson had not had the opportunity to review any of the orders issued by the Supreme Court before he issued the fourth stay. Judge Reinhardt sug-

280. Reinhardt, supra note 6, at 211.
281. Id.
282. Id. (citing Gomez v. Vasquez, No. 92-55426 (9th Cir. Apr. 20, 1992) (third stay)).
283. Reinhardt, supra note 6, at 211 (citing Gomez v. Vasquez, No. 92-70237 (9th Cir. Apr. 20, 1992) (second stay)).
284. See Lungren, supra note 9, at 4. Attorney General Lungren has stated his office was unable to reach anyone in the clerk’s office or with the court. Id.
285. Lungren, supra note 9, at 4.
287. Harris v. Vasquez, No. 92-70237 (9th Cir. Apr. 21, 1992) (fourth stay). At Harris’ request, the section 1983 action was converted into his sixth federal habeas petition. No. C-92-1482-MHP (N.D. Cal.); No. 92-70237 (9th Cir.). Thus, the fourth stay was issued based on the habeas petition. Id.
288. Pregerson has taken similar action before. In June 1990, he granted a stay of execution to Thomas Baal just 90 minutes before Baal was scheduled to die by lethal injection in Nevada. The stay was overturned by the Supreme Court and Baal was put to death on June 3, 1990. Harriet Chiang, Judge Explains Stay of Execution, S.F. CHRON., May 18, 1992, at A13.
289. Reinhardt, supra note 6, at 213. Apparently, however, the Ninth Circuit clerk’s office was in contact with Judge Pregerson’s staff throughout the evening of Harris’ exe-
gested further that Judge Pregerson may have assumed, after
learning of the Supreme Court's decision to vacate the second
stay\textsuperscript{289} that the Justices had agreed with the panel's ruling that
Harris was in the wrong court.\textsuperscript{290} If that were the case, Judge
Reinhardt reasoned, Judge Pregerson's order would have given
Harris' attorneys time to go to the proper court for a hearing on
the cruel and unusual punishment issue.\textsuperscript{291}

In fact, however, the Supreme Court had already ruled on
the cruel and unusual punishment issue.\textsuperscript{292} The Court had
weighed the equities and determined that California's "strong
interest in proceeding with its judgment" was strengthened by
the fact that, regardless of whether Harris' suit was character­
ized as a habeas corpus petition or a new civil suit, he could
have brought the claim more than a decade ago.\textsuperscript{293} Thus, Judge
Pregerson's stay was duplicative and inappropriate.\textsuperscript{294}

Judge Robert Bork characterized the multiple stays issued
by Ninth Circuit judges as a case of judicial civil disobedience.\textsuperscript{295}
"Those judges who, after years of judicial examination and re­
examination of the conviction, repeatedly issued last-minute
stays of execution evidently thought their personal opposition to
capital punishment was reason enough to defy what law and

duction. Telephone Interview with Jeri Curtis, Senior Deputy in Charge of Operations for
the Ninth Circuit (Mar. 21, 1993).

Moreover, because Pregerson was a participant in the second stay, it was arguably
incumbent upon him to inquire into the Supreme Court's reasoning in denying the sec­
ond stay before issuing a fourth stay.

\textsuperscript{289} Gomez v. United States Dist. Court, 112 S. Ct. 1652, 1653 (1992) (per curiam)
(vacating second, and third stays) (Stevens, J., dissenting).

\textsuperscript{290} Reinhardt, supra note 6, at 213.

\textsuperscript{291} Id.

\textsuperscript{292} Gomez, 112 S. Ct. at 1653.

\textsuperscript{293} Id.

\textsuperscript{294} Ironically, Judge Pregerson's stay, ostensibly aimed at avoiding cruel and un­
usual punishment, had the ultimate effect of imposing that which it sought to avert, to
wit, Harris' reported mental anguish at having to face death twice, once around 4 a.m.,
when he was removed from the gas chamber just moments from death, and then again
around 6 a.m., when his execution finally took place. This was the first time in San
Quentin history that a prisoner was taken from the gas chamber alive. Richard C. Pad­
dock, 9th Circuit Judge Criticizes High Court Over Execution, L.A. TIMES, Apr. 26,

\textsuperscript{295} Bork, supra note 9. Professors Caminker and Chemerinsky, who have labelled
Harris' execution "lawless," nevertheless concede that Judge Pregerson's actions may
have "reasonably foreshadowed a pattern of continuous defiance." Caminker and
Chemerinsky, supra note 6, at 249.
their judicial superiors demanded."

Even if the stays were meritorious, their issuance by members of the Ninth Circuit rested on questionable legal footing, according to California Attorney General Dan Lungren.\textsuperscript{297} The mandate of the Ninth Circuit panel, preceding the four stays, had issued immediately, and under Ninth Circuit rules, individual members of the court cannot stay an execution after such an action, unless the mandate has been recalled (which it was not).\textsuperscript{298} Moreover, although two of the first three stay requests were based upon the section 1983 action, the stay orders were based upon special rules for habeas corpus actions.\textsuperscript{299} Consequently, there was no direct authority supporting the four stays.\textsuperscript{300}

Given (1) the inability of the Ninth Circuit to effectively communicate within its ranks, (2) the apparent closing of the Ninth Circuit clerk’s office after the third stay was vacated, (3) the invalid issuance of two successive stays, and (4) the questionable legal footing of all four stays, the Supreme Court was certainly justified in exercising its supervisory power over the administration of justice in the federal courts.

2. The All Writs Act

Contrary to popular media interpretation, the Supreme Court’s language barring further stays “except upon order of this Court” should not be read as barring all further stays.\textsuperscript{301} Rather, it expressly acknowledged the potential for requests for additional stays, so long as such requests were made directly to the Supreme Court.\textsuperscript{302} This was an act by the Supreme Court to retain its jurisdiction over the case and to enjoin parallel proceedings. Such a ruling was entirely within the Supreme Court’s

\textsuperscript{296} Bork, supra note 9.
\textsuperscript{297} Lungren, supra note 9, at 4.
\textsuperscript{298} Id.; see also 9th Cir. R. 22-5.
\textsuperscript{299} Lungren, supra note 9, at 4; see also 9th Cir. R. 22-2.
\textsuperscript{300} Lungren, supra note 9, at 4.
\textsuperscript{301} Professors Caminker and Chemerinksy asserted that “[t]he prospective injunction barred issuance of a stay on any legal grounds whatsoever . . . .” Caminker & Chemerinsky, supra note 6, at 246.
\textsuperscript{302} Lungren, supra note 9, at 4.
powers under the All Writs Act.\textsuperscript{303}

The broad language of the All Writs Act has been strengthened by case law outlining situations where issuing writs of mandamus in aid of jurisdiction is appropriate.\textsuperscript{304} Notably, in a 1990 case,\textsuperscript{305} a New York district court held that one of the situations in which intercourt injunctions under the All Writs Act are proper is “enjoining repeated, baseless, vexatious litigation by the same plaintiff in a federal court.”\textsuperscript{306} In \textit{Cinel v. Connick},\textsuperscript{307} the federal district court clarified this vexatious litigation situation further, holding that “any order under the [All Writs] Act must be directed at conduct which, if left unchecked, would have had the practical effect of diminishing the court’s power to bring the litigation to a natural conclusion.”\textsuperscript{308}

\textsuperscript{303} The statute reads as follows: “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a) (1988).

\textsuperscript{304} See \textit{LaBuy v. Howes Leather Co.}, 352 U.S. 249, 255 (1957) (“[t]he question of naked power has long been settled by this Court”); \textit{Roche v. Evaporated Milk Ass'n}, 319 U.S. 21, 26 (1943) (“the traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction”); \textit{Bankers Life & Casualty Co. v. Holland}, 346 U.S. 379, 383 (1953) (the writ is appropriately issued when there is “usurpation of judicial power” or a clear abuse of discretion).


\textsuperscript{306} \textit{id.} at 1043; see \textit{Safir v. United States Lines, Inc.}, 792 F.2d 19, 23-24 (2nd Cir. 1986). Additional situations include:

(1) enjoining state actions when necessary to prevent relitigation of an existing federal judgment. \textit{Teamsters}, 728 F. Supp. at 1043 (quoting \textit{In re Baldwin-United Corp.}, 770 F.2d 328, 335 (2d Cir. 1985) and citing United States v. New York Telephone, 434 U.S. 159, 172 (1977));

(2) preventing a state court from interfering with a federal court’s consideration of disposition of a case so “as to seriously impair the federal court’s flexibility and authority to decide that case.” \textit{Teamsters}, 728 F. Supp. at 1043 (citing \textit{Baldwin-United}, 770 F.2d at 335 (quoting Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Engineers, 398 U.S. 281, 295 (1970)));

(3) “enjoining a state court seeking to entertain an action over the same res; and in an \textit{in rem} action, when the parallel state action will defeat the already attached jurisdiction of the federal court.” \textit{Teamsters}, 728 F. Supp. at 1043 (quoting \textit{Baldwin-United}, 770 F.2d at 336, citing Kline v. Burke Construction Co., 260 U.S. 226, 230 (1922), and comparing Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 642 (1977)); and


\textsuperscript{308} \textit{id.} at 497 (quoting \textit{ITT Community Dev. Corp. v. Barton}, 569 F.2d 1351, 1359 (5th Cir. 1978)).
As previously noted, due to early morning confusion within the Ninth Circuit, duplicative second and third stays had already been issued. Furthermore, Judge Pregerson's fourth stay was based on his misconception (or disregard) of the basis upon which the Supreme Court lifted a prior stay. At a minimum, the third and fourth stays qualify as repeated and baseless.

Also as previously noted, the Ninth Circuit clerk's office shut down after the third stay of the night was vacated. Realizing this, the Supreme Court may well have determined it was necessary in its final order to retain its jurisdiction over the case conditionally, while expressly preserving the possibility for further requests for stay.

Finally, all of the activity surrounding Harris' execution occurred against a backdrop of traditional tension between the Ninth Circuit and the Supreme Court over the death penalty. The appeals court and the Supreme Court have battled in the past over the pace of capital cases. Despite scores of Supreme Court rulings since 1976 upholding the death penalty and restricting grounds for appeal, the Ninth Circuit had successfully blocked executions throughout the West until an April, 1992 execution in Arizona. As recently as January, 1992, the Justices

309. See supra notes 275-83 and accompanying text.
310. See supra note 284.
311. See Lungren, supra note 9, at 4.
312. "The Supreme Court may perceive the Ninth Circuit as a special problem in [death penalty cases]," observed former Deputy U.S. Solicitor General Andrew Frey. "That isn't to say either side is right. It's just that the Ninth Circuit has always been a different animal." Richard C. Paddock & Henry Weinstein, Appeal Judges Maneuvered Amid Chaos, L.A. TIMES, April 22, 1992, at A1.
313. Id.
314. Don Eugene Harding was executed in Arizona on April 6, 1992. Howard Mintz and Richard Barbieri, Will Ninth Circuit Fall in Line?, THE RECORDER, Apr. 22, 1992, at 1. A breakdown, by state, of the executions carried out since the 1976 U.S. Supreme Court ruling allowing states to resume use of the death penalty clearly demonstrates the ninth circuit's reluctance to do so. In all, 188 men and one woman have been executed in 21 different states since 1976. Only eight of those are in the Ninth Circuit. (Thirty-eight states, including four states within the Ninth Circuit, have death-penalty statutes.) John K. Wiley, Execution of Triple Murderer Is First By Hanging Since 1965, S.F. CHRON., Jan. 6, 1993, at A15.

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<tr>
<th>Ninth Circuit States</th>
<th>Other States</th>
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<tr>
<td>Arizona: 1 (4/6/92)</td>
<td>Texas: 54 Florida: 29</td>
</tr>
<tr>
<td>California: 1 (4/21/92)</td>
<td>Louisiana: 20 Virginia: 17</td>
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issued a sharp rebuke to the Ninth Circuit for delaying action on a pending death penalty case from the state of Washington for more than two years.\footnote{316} The skirmish which took place the Monday evening before Harris' execution, however, was much more "severe."\footnote{316}

In the wake of the Harris execution, and at the behest of Justice Sandra Day O'Connor, the Ninth Circuit\footnote{317} has proposed curbs on last-minute stays of execution. Their action is "designed to avoid the confusing flurry of court actions that delayed the execution of Robert Alton Harris."\footnote{318} Among the proposed changes is the elimination of a rule that allows any judge on the 28-member court to stop an execution.\footnote{319}

It is certainly arguable that the frenzy of last-minute stays were "intended to subvert the rule of law as established by a higher court."\footnote{320} According to newspaper accounts, one Ninth Circuit judge said the Supreme Court was well within its bounds.\footnote{321} The Supreme Court was simply enjoining the Ninth Circuit from continuing to defy the high Court's orders against staying Harris' execution on the basis of his lethal gas claim, according to the judge.\footnote{322}

\begin{tabular}{llll}
Washington: & 1 & (1/5/93)  &  \\
Nevada:    & 5  &  & \\
Georgia:   & 15 &  &  \\
Missouri:  & 7  &  &  \\
North Carolina: & 5 &  &  \\
South Carolina: & 4 &  &  \\
Mississippi: & 4 &  &  \\
Illinois:  & 1  &  &  \\
Delaware:  & 1  &  &  \\
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\footnote{315}{Paddock & Weinstein, \textit{supra} note 182, at A1.}
\footnote{316}{Id.}
\footnote{317}{This court is the largest federal appeals court in the United States. Harriet Chiang, \textit{Court Plans to Limit Execution Appeals}, S.F. CHRON., Nov. 7, 1992, at A14.}
\footnote{318}{Id.}
\footnote{319}{9TH CIR. R. 22-5(e)(4).}
\footnote{320}{\textit{Requiem for A Murderer}, \textit{supra} note 9. One Ninth Circuit judge, who spoke on the condition of anonymity, said, "There was never much question that the Ninth Circuit judges would lose and that Harris would eventually be executed." But he added: "Everybody does what they have to do . . . . You feel, just maybe, there will be enough people on the high court who will see it your way." Paddock & Weinstein, \textit{supra} note 182, at A1.}
\footnote{321}{Lisa Stansky, \textit{High Court's Power Debated In Harris Case}, The Recorder, April 28, 1992, at 1. "I find it astonishing that anyone would question the power of the Supreme Court of the United States to enforce its own judgments and enforce its orders," said the judge, who asked to remain nameless. \textit{Id.}}
\footnote{322}{\textit{Id.} "The court did the only thing it could do in the face of naked defiance of its orders," the judge said. \textit{Id.}}
Contrary to the conclusion reached by Professors Caminker and Chemerinsky,\textsuperscript{328} had Harris' close brush with death at 3:51 a.m. prompted his brother, out of crystallized feelings of guilt, to reveal exculpatory information about Harris' role in his criminal activity, Harris' attorneys could have contacted the Supreme Court directly.\textsuperscript{324}

Thus, even if the rather "nebulous inherent supervisory powers"\textsuperscript{328} of the Supreme Court were insufficient to confer jurisdiction upon the Supreme Court for its decision to issue the injunction against further stays, the Supreme Court's action was an appropriate assertion of its statutory jurisdiction under the All Writs Act, and was intended to bring the Harris litigation to a natural and just conclusion.

Kent Scheidegger, legal director of the pro-death penalty group Criminal Justice Legal Foundation in Sacramento, believes that the "Ninth Circuit went berserk." Scheidegger singled out Judge Pregerson for special criticism, saying it was clear from the Supreme Court's second order that it considered the eighth amendment claim to be too late, whether raised in a civil or habeas case. The judge, in Scheidegger's view, disregarded the Supreme Court's clear and controlling precedent when he issued the fourth stay. Reske, \textit{supra} note 7, at 26.

California Governor Pete Wilson issued a scathing press release after Harris' execution in which he criticized Judge Pregerson and his colleagues for issuing four stays of execution. "The behavior of individual judges of the Ninth Circuit has excited new meaning for the phrase 'contempt of court,'" Wilson said. Chiang, \textit{supra} note 188, at A13.


323. See Caminker & Chemerinsky, \textit{supra} note 6, at 246.

324. It is doubtful what effect even such an exculpatory revelation would have had at this late juncture. See \textit{Herrera v. Collins}, 113 S. Ct. 853 (1993) (exculpatory information held irrelevant in the face of proper proceedings at state court level). Cf. Stephen J. Markman & Paul G. Cassell, \textit{Protecting the Innocent: A Response to the Bedau-Radelet Study}, 41 \textit{Stan. L. Rev.} 121 (1988) (maintaining there is no credible evidence that anyone who was not guilty has been executed as a result of capital punishment).

Moreover, Harris had already made the claim that his brother shot one of the two San Diego teenagers. The claim was most recently rejected by United States District Judge Howard B. Turrentine on Friday, April 17. "If that [the claim] was true," Turrentine said, "it would have been discovered a long time ago." Philip Hager & Richard C. Paddock, \textit{Harris Execution Delayed by Judge}, \textit{L.A. Times}, Apr. 19, 1992, at A1.

325. See Caminker & Chemerinsky, \textit{supra} note 6, at 247.
3. Extraordinary Circumstances

In addition to the procedural and logistical difficulties which justified the Supreme Court's final injunction against further stays, the Harris case involved several extraordinary circumstances which rendered it unique. 326

First, despite the Ninth Circuit's documented reluctance to execute death penalty convictions, few cases have traveled Harris' circuitous path. His legal maneuvers included a total of six federal habeas petitions and ten state habeas petitions over a 14-year period. 327 Yet there was never any real dispute over his guilt, or over the depravity of his crimes. 328

Second, the flurry of activity in the week prior to Harris' execution was unprecedented. On April 17, just four days before his scheduled execution, and after his case had already received eleven separate reviews, 329 Harris filed three new lawsuits, including a federal class action. 330 Oral arguments, written briefs, and hurried decisions commandeered the Easter holiday weekend. Attorneys were forced to await written opinions before being able to respond to oral mandates issued hours earlier. 331 The frenzy continued up until just 20 minutes before Harris' execution, when it was ended by the Supreme Court's final ruling. 332

Finally, as the inevitability of Harris' execution became apparent, his attorneys telephoned Judge Harry Pregerson at home and communicated an urgent final appeal on an ex parte basis. Had the State's attorneys been contacted or included in the early morning phone call with Pregerson, the fourth appeal may well never have issued. 333 Such conduct approximates forum
shopping and undermines the importance of the adversarial process. It was in the wake of Judge Pregerson’s resultant stay that the Supreme Court responded with resounding finality. The alternative was to rely on a Ninth Circuit court that had seemed to collapse under the pressure of the Harris case and was being abused by Harris’ lawyers.

The sum of these unusual circumstances, while not forming any independent legal basis for the Supreme Court’s action, should certainly be factored into an evaluation of its propriety.

VI. CONCLUSION

The off-again, on-again execution of Robert Alton Harris represented everything that advocates on both sides of the issue say is wrong with the death penalty in America. Death penalty proponents and opponents, albeit for different reasons, agreed that what went on in the last hours before the cyanide tablets were dropped into an acid solution was both wrong and typical. Judge Robert Bork observed that Harris could never have been executed, even after multiple future hearings, without another battle against the clock. One has only to look to other states where executions have recently been carried out to realize the truth of his words. The Supreme Court’s action to end the excruciating series of last-minute stays, one of which came while Harris was strapped into the gas chamber chair, was both justified and merciful.

Henry Thoreau once wrote, “I do not lend myself to the

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supra note 9, at 4.

334. Id.

335. Vasquez, 112 S. Ct. at 1714.

336. Lungren, supra note 9, at 4.


338. Id.

wrong which I condemn.  

Yet as philosopher Peter Singer wisely pointed out, those who think they must disobey democratic laws in order to avoid acquiescing, or seeming to acquiesce, in particular results of the democratic system are mistaken: their actions are really indicative of a refusal to acquiesce in the democratic system itself.

Deirdre J. Cox

340. Henry D. Thoreau, ON CIVIL DISOBEDIENCE (1849) at 36.
341. Peter Singer, DEMOCRACY AND DISOBEDIENCE (1973) at 102.
* Golden Gate University School of Law, Class of 1994.
APPENDIX

CHRONOLOGY OF PROCEDURAL HISTORY: ROBERT ALTON HARRIS

7/5/78: Robert Alton Harris (on parole for a voluntary manslaughter conviction) and his brother Daniel are arrested as suspects in the kidnap and murder of two 16-year-old boys, Michael Baker and John Mayeski. Baker’s father is one of the officers who capture Harris.

1/24/79: Robert Alton Harris is convicted by a jury (in a bifurcated trial) of two counts of murder (as well as kidnapping, robbery, receiving stolen property, and possession of concealable firearms by an ex-felon). Superior Court Judge Eli Levenson denies Harris’ motions for a new trial. No. CR 44135 (Super. Ct., S.D. County).


2/11/81: California Supreme Court affirms Harris’ conviction on direct appeal, and simultaneously denies his first state petition for a writ of habeas corpus. *People v. Harris*, 623 P.2d 240 (1981). No. CR 20888 (Cal.). (This is the same state supreme court that, under the guidance of Chief Justice Rose Bird, overturned 64 out of 68 death sentences prior to 1986. Harris’ was one of the four the Bird court let stand.2)


6/22/81: California Supreme Court stays the July 7, 1981 execution pending Harris' appeal to the United States Supreme Court. No. CR 44135 (Super. Ct. S.D. County).


11/24/81: Judge Don Smith denies Harris' second state petition for a writ of habeas corpus. No. HC 5841 (Super. Ct. S.D. County).

11/25/81: California Court of Appeal denies Harris' third state petition for a writ of habeas corpus. No. CR 13691 (Cal. App. 4th Dist.).

12/9/81: California Supreme Court grants another stay of execution to provide time for the court to rule on Harris' petition for a new trial. No. CR 22380 (Cal.).

1/13/82: California Supreme Court denies Harris' fourth state petition for a writ of habeas corpus, refusing to overturn his conviction. No. CR 22380 (Cal.).


3/12/82: United States District Judge William Enright denies Harris' first federal petition for a writ of habeas corpus. No. 82-0249-E (S.D. Cal.).

3/12/82: Ninth Circuit issues a stay of execution pending Harris' appeal of the denial of his first federal habeas corpus petition. Harris argues that the state's death penalty law is unconstitutional because it discriminates against men. No. 82-5246 (9th Cir.).
Superior Court Judge James Malkus denies Harris' fifth state petition for a writ of habeas corpus. No. HC 6063 (Super. Ct. S.d. County).

California Court of Appeal denies Harris' sixth state petition for a writ of habeas corpus. No. CR 13922 (Cal. App. 4th Dist.).


California Supreme Court denies Harris' seventh state petition for a writ of habeas corpus. No. CR 22612 (Cal.).

Ninth Circuit (in response to Harris' appeal of the denial of his first federal habeas petition) remands Harris' case to the state courts with an order that they conduct a proportionality review. This decision has the effect of indefinitely blocking any executions. *Harris v. Pulley*, 692 F.2d 1189 (9th Cir. 1982). No. 82-5246 (9th Cir.).

Ninth Circuit denies Harris' petition for rehearing and suggestion for rehearing *en banc* (relating to their 9/16/82 decision), and amends opinion 692 F.2d 1189. No. 82-5246 (9th Cir.).

United States Supreme Court grants the Attorney General's petition for writ of *certiorari* from the Ninth Circuit's decision in Harris' first federal appeal, and grants leave for Harris to proceed *in forma pauperis*. *Pulley v. Harris*, 460 U.S. 1036 (1983). No. 82-1095 (U.S.).

United States Supreme Court denies *certiorari* with regard to Harris' cross-petition for writ of *certiorari* from the Ninth Circuit's decision in Harris' first federal appeal. *Harris v. Pulley*, 460 U.S. 1047 (1983) (Brennan, J., dissenting). No. 82-6019 (U.S.).

2/23/84: Ninth Circuit remands to United States District Court in light of United States Supreme Court reversal. *Harris v. Pulley*, 726 F.2d 569 (9th Cir. 1984). No. 82-5246 (9th Cir.).

7/26/84: United States District Judge William Enright denies Harris’ second federal petition for a writ of habeas corpus. No. 82-1005-E (S.D. Cal.).

10/17/84: United States District Judge Enright denies issues remaining from Ninth Circuit remand on first federal habeas. No. 82-0249-E (S.D. Cal.).

7/8/88: Ninth Circuit affirms district court’s denial of Harris’ second federal petition for a writ of habeas corpus. *Harris v. Pulley*, 852 F.2d 1546 (9th Cir. 1988). No. 84-6433 (9th Cir.).

9/28/89: Ninth Circuit denies Harris’ petition for rehearing and suggestion for rehearing en banc (relating to their 7/8/88 decision), and supersedes opinion 852 F.2d 1546. *Harris v. Pulley*, 885 F.2d 1354 (9th Cir. 1988). No. 84-6433 (9th Cir.).


3/16/90: California Supreme Court denies Harris’ eighth state petition for a writ of habeas corpus. No. S013598 (Cal.).
United States District Court Judge William B. Enright denies Harris' third federal petition for a writ of habeas corpus. Harris alleges that defense psychiatrists did not competently analyze his mental state. No. 90-380-E (S.D. Cal.)

Ninth Circuit Judge Noonan issues stay of execution four days prior to Harris' April 3 scheduled execution, pending Harris' appeal of the denial of his third federal habeas corpus petition. *Harris v. Vasquez*, 901 F.2d 724 (9th Cir. 1990). No. 90-55402 (9th Cir.). (Judges Alarcon and Brunetti did not participate in the decision to grant the stay of execution.)


Ninth Circuit Judges Alarcon and Brunetti affirm district court's denial of Harris' third federal petition for a writ of habeas corpus. *Harris v. Vasquez*, 913 F.2d 606 (9th Cir. 1990) (Noonan, J., concurring in part and dissenting in part). No. 90-55402 (9th Cir.).

Ninth Circuit denies Harris' petition for rehearing and suggestion for rehearing en banc (relating to their 8/29/90 decision), and amends opinion 913 F.2d 606. No. 90-55402 (9th Cir.).

Ninth Circuit Judges Alarcon and Brunetti remand to district court for Evidentiary Hearing on Government Agent Claim and Abuse of Writ. *Harris v. Vasquez*, 928 F.2d 891 (9th Cir. 1991) (Noonan, J., dissenting). No. 90-55402 (9th Cir.).

3. See Ninth Circuit Gen. Order 6.3(e) ("Any member of the [motions] panel may enter an order granting [an] application" for a stay of execution).
5/21/91: United States District Court Judge William Enright issues Memorandum Decision after evidentiary hearing following remand order. No. 90-380-E (S.D. Cal.)

8/21/91: Ninth Circuit issues second amendment to their 8/29/90 decision and supersedes 913 F.2d 606. *Harris v. Vasquez*, 943 F.2d 930 (9th Cir. 1990) (Noonan, J., concurring in part, dissenting in part). No. 90-55402 (9th Cir.).

11/8/91: Ninth Circuit denies Harris' petition for rehearing and suggestion for rehearing en banc (relating to their 8/21/91 decision), and corrects opinion 943 F.2d 930. (9th Circuit judges voted 13 to 13. Under court rules, a tie vote is a loss for Harris.) *Harris v. Vasquez*, 949 F.2d 1497 (9th Cir. 1990) (Noonan, J., concurring in part and dissenting in part). No. 90-55402 (9th Cir.).

11/15/91: Ninth Circuit grants 60-day stay of mandate pending Harris' application for a writ of certiorari before the United States Supreme Court. No. 90-55402 (9th Cir.).


4. The Ninth Circuit could have ended their review after dismissing each claim of Harris' third petition for federal habeas corpus relief. Instead, they reviewed "the merits of each of Harris' claims that can be reviewed on habeas corpus, with the hope that all questions concerning the validity of the state court's judgment will finally be resolved after eleven years of writs and appeals." *Harris v. Vasquez*, 949 F.2d 1497, 1516 (9th Cir. 1990) (emphasis added).
1993] CRIMINAL PROCEDURE

4/16/92: Governor Pete Wilson denies Harris’ clemency petition.

4/16/92: Harris files ninth state petition for writ of habeas corpus. No. S026177 (Cal.).

4/17/92: Harris’ attorneys file a civil rights class action in United States District Court for the Northern District of California and request a ten-day restraining order prohibiting use of lethal gas. Fierro v. Gomez. No. 92-1489-MHP (N.D. Cal.).


4/18/92: Harris files fourth federal petition for writ of habeas corpus in United States District Court for the Southern District of California. No. 92-0588-T (S.D. Cal.).

4/18/92: United States District Judge Howard Turrentine denies fourth federal habeas petition. No. 92-0588-T (S.D. Cal.).

4/18/92: Harris files application to recall the mandate in the third federal habeas petition in the Ninth Circuit. No. 90-55402 (9th Cir.).


4/18/92: Attorney General files application for a writ of mandamus in the Ninth Circuit to overturn the temporary restraining order. No. 92-70237 (9th Cir.).

4/19/92: Harris files a request for stay of execution and application for certificate of probable cause in Ninth Circuit to appeal denial of fourth federal habeas. No. 92-55426 (9th Cir.).
4/20/92 10 a.m. Ninth Circuit panel denies Harris' application to recall mandate in third federal habeas. *Harris v. Vasquez*, 961 F.2d 1449 (9th Cir. 1992) (Noonan, J., dissenting). No. 92-55402 (9th Cir.).

4/20/90 10 a.m. Ninth Circuit unanimously denies Harris' application for stay of execution and certificate of probable cause in fourth federal habeas. *Harris v. Vasquez*, 961 F.2d 1450 (9th Cir. 1992). No. 92-55426 (9th Cir.).

4/20/92 3 p.m. Ninth Circuit panel (by a vote of 2-1) grants Attorney General's petition for a writ of mandamus on lethal gas case and vacates the temporary restraining order, opinions to follow. *Gomez v. United States Dist. Court*, 790 F. Supp. 972 (9th Cir. 1992). No. 92-70237 (9th Cir.).

4/20/92 6:30 p.m. A single Ninth Circuit judge* issues the first order staying Harris’ execution for 10 days under Ninth Circuit Rule 22-5 (first stay). No. 92-55426 (9th Cir.).

4/20/92 10:20 p.m. Ten Ninth Circuit judges issue order staying execution in lethal gas case (second stay). No. 92-70237 (9th Cir.).


4/20/92 12 Mid Harris files fifth federal petition for writ of habeas corpus in United States District Court for the Northern District of California. No. 92-1504-RMW (N.D. Cal.).

4/21/92 12:05 a.m. A single Ninth Circuit judge* issues third stay of execution under Ninth Circuit Rule 22-5. No. 92-70237 (9th Cir.).

5. Judge John Noonan, Jr., according to Howard Mintz and Richard Barbieri, *Will Ninth Circuit Fall in Line?*, The Recorder, April 22, 1992, at 1. Mintz and Barbieri reported that a spokeswoman for the American Civil Liberties Union said the judge was John Noonan Jr., but that Judge Noonan could not be reached for comment. *Id.*

6. Judge William Norris, according to one newspaper account. See Richard C. Pad-
<table>
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<tr>
<th>Date</th>
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<tr>
<td>4/21/92</td>
<td>12:30 a.m.</td>
<td>United States District Court Judge Ron Whyte dismisses fifth federal habeas petition and transfers case to the United States District Court for the Southern District of California. No. 92-1504-RMW (N.D. Cal.); No. 92-615-T (S.D. Cal.).</td>
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<td>4/21/92</td>
<td>1 a.m.</td>
<td>Harris' attorneys withdraw the fifth federal habeas petition. No. 92-615-T (S.D. Cal.).</td>
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<tr>
<td>4/21/92</td>
<td>3:40 a.m.</td>
<td>Harris asks the United States District Court for the Northern District of California and the Ninth Circuit to consider his Section 1983 action to be a sixth federal habeas petition and to grant a stay of execution to exhaust state remedies. No. C-92-1482-MHP (N.D. Cal.); No. 92-70237 (9th Cir.).</td>
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<tr>
<td>4/21/92</td>
<td>3:51 a.m.</td>
<td>A single Ninth Circuit judge (Judge Harry Pregerson) telephones San Quentin to issue fourth stay. Harris has already been sealed in the gas chamber. Harris is unstrapped from the chair and removed from the chamber.</td>
</tr>
<tr>
<td>4/21/92</td>
<td>4:39 a.m.</td>
<td>Written order of Ninth Circuit Judge Pregerson is received. It grants a one-day stay on a federal habeas petition. No. 92-70237 (9th Cir.).</td>
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<tr>
<td>4/21/92</td>
<td>5:20 a.m.</td>
<td>Harris files tenth state petition for writ of habeas corpus in California Supreme Court. No. S026235 (Cal.).</td>
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<td>4/21/92</td>
<td>5:45 a.m.</td>
<td>United States Supreme Court vacates fourth stay and orders no further stays &quot;except upon order of this court.&quot; <em>Vasquez v. Harris</em>, 112 S. Ct. 1713 (1992). No. A-768 (U.S.)</td>
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4/21/92  6 a.m.  California Supreme Court denies Harris' tenth state petition for writ of habeas corpus. No. S026235 (Cal.).

4/21/92  6:01 a.m.  Harris returns to the gas chamber.

4/21/92  6:21 a.m.  Harris is pronounced dead.

4/22/92  The same three-judge Ninth Circuit panel which overruled Patel's order temporarily barring Harris' execution, recalls and vacates writ of mandamus as moot and withdraws its opinion filed on April 20, 1992, thereby removing a cloud over her jurisdiction in the case. *Gomez v. United States Dist. Court*, 966 F.2d 463 (9th Cir. 1992). No. 92-70237 (9th Cir.).